RECORD AND BRIEFS

FILED
FEB 1 - 2017
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NO. 16-327

IN THE

Supreme Court of the United States

JAE LEE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

JOHN J. BURSCH*
BURSCH LAW PLLC
9339 Cherry Valley Ave SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com
Attorney for Petitioner

IAN HEATH GERSHENGORN*
ACTING SOLICITOR GENERAL
UNITED STATES DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
(202) 514-2217
SupremeCtBriefs@USDOJ.gov
Attorney for Respondent

**Counsel of Record*

PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 6, 2016
CERTIORARI GRANTED DECEMBER 14, 2016

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The following opinions, orders, and reports have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

August 6, 2013 District Court Report and Recommendation ..... Pet. App. 51a–77a

March 20, 2014 District Court Order ..... Pet. App. 11a–50a

June 8, 2016 Sixth Circuit Opinion ..... Pet. App. 1a-10a

RELEVANT DOCKET ENTRIES

United States District Court
Western District of Tennessee
No. 2:09-cv-20011

United States of America* v. *Jae Lee

Date Filed	No.	Docket Text
01/28/2009	2	Redacted Indictment as to Jae Lee. (jae) (Entered: 01/29/2009)
06/18/2009	21	PLEA AGREEMENT as to Jae Lee. (tpe) (Entered: 06/18/2009)
09/29/2009	27	REDACTED JUDGMENT as to Jae Lee (1), Count 1, 12 months and 1 day Incarceration; 3 years Supervised Release; $5000 Fine; $100 Special Assessment. Signed by Judge Bernice B. Donald on 9/29/09. (Donald, Bernice) (Entered: 09/29/2009)

RELEVANT DOCKET ENTRIES

United States District Court
Western District of Tennessee
No. 2:10-cv-2698

Jae Lee* v. *United States of America

Date Filed	No.	Docket Text
09/24/2010	1	PRO SE COMPLAINT - Motion Pursuant to 28 U.S.C. § 2255 to Vacate Conviction and Sentence filed by Jae Lee against United States of America. (Attachments: # 1 Movant's Appendix of Exhibits, # 2 Judicial Cards)(csf) (Entered: 09/24/2010)
10/28/2010	5	AMENDED Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence filed by Jae Lee against United States of America.(csf) (Entered: 10/29/2010)
05/23/2013	56	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on February 9, 2012, Evidentiary Hearing before Judge Diane K. Vescovo. Court Reporter Lynn Dudley, Telephone number (901)525-1023. . . . (Dudley, Lynn) (Entered: 05/23/2013)

Date Filed	No.	Docket Text
03/20/2014	70	JUDGMENT re DE 69 ORDER. Signed by Judge John T. Fowlkes, Jr on 3/20/14. (Fowlkes, J.) (Entered: 03/20/2014)
03/31/2014	71	NOTICE OF APPEAL as to 69 Order on Report and Recommendations, 70 Judgment by Jae Lee. Appeal Record due by 4/18/2014. (McNally, Patrick) (Entered: 03/31/2014)

RELEVANT DOCKET ENTRIES

United States Court of Appeals
for the Sixth Circuit
No. 14-5369

Jae Lee* v. *United States of America

Date Filed	No.	Docket Text
06/08/2016	20	OPINION and JUDGMENT filed : The district court's denial of Lee's § 2255 motion to vacate his conviction and sentence is AFFIRMED. Decision for publication. Alan E. Norris, Alice M. Batchelder (AUTHORING), and Jeffrey S. Sutton, Circuit Judges. (CL)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DISTRICT

UNITED STATES OF AMERICA,	*	CR. NO. 09-20011
Plaintiff,	*	21 U.S.C. § 841(a)(1)
v.	*	
JAE LEE,	*	
a/k/a "Jae L. Williams",	*	
Defendant.	*	

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

On or about January 7, 2009, in the Western District of Tennessee, the defendant, **JAE LEE, a/k/a/ "Jae Williams"** did unlawfully, knowingly and intentionally possess with the intent to distribute a mixture and substance containing a detectable amount of controlled 3,4-methylenedioxymethamphetamine, commonly known as "MDMA" and/or "ecstasy," a controlled substance as classified by Title 21, United States Code, Section 812 as a Schedule I controlled substance, all in violation of Title 21, United States Code, Section 841(a)(1).

S/Grand Jury Foreperson
FOREPERSON

DATED: 1-28-2009

UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DISTRICT

UNITED STATES OF AMERICA,	*	No. 09-20011-BBD
Plaintiff,	*	FILED IN
vs.	*	OPEN COURT
JAE LEE, a/k/a "Jae L. Williams,"	*	DATE: 6/17/09
	*	TIME: 10:46 AM
Defendant.	*	INITIALS: _____

MEMORANDUM OF PLEA AGREEMENT

The Defendant, JAE LEE, a/k/a "Jae L. Williams," through his attorney, Larry Fitzgerald, knowingly and voluntarily agrees with the United States, through the United States Attorney for the Western District of Tennessee, through the undersigned Assistant U.S. Attorney, to plead guilty to Count 1 of the above-numbered Indictment, charging the Defendant with a violation of 21 U.S.C. § 841(a)(1).

1. Pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure and in consideration for the Defendant's plea of guilty, the Government and the Defendant will jointly recommend that the Defendant receive a three-level reduction for acceptance of responsibility under U.S. Sentencing Guidelines §3E1.1. The Defendant understands that if the Court does not accept these recommendations the Defendant nevertheless has no right to withdraw the plea. In addition, the Government will not object to a

finding that the Defendant qualifies under the safety valve provisions of 18 U.S.C. § 3553(f) and U.S.S.G. §5C1.2, provided that this Defendant has complied with the requirements for this reduction, including the following: (1) that he has no more than 1 criminal history point; and (2) no later than the time of sentencing, he has, in the Government's view, truthfully provided to the Government all information and evidence he has concerning the offenses charged in the Indictment in this case.

2. Neither the Government nor any law enforcement officer can or does make any promises or representations. as to what sentence will be imposed by the Court.

3. The Defendant understands that the accurate Sentencing Guidelines range must be taken into account by the Court before imposing a sentence, but that the Court is not bound by the Sentencing Guidelines and can impose any sentence within statutory limits.

4. Should it be judged by the Government that the Defendant has committed or attempted to commit any additional crimes or has engaged in any conduct constituting obstructing or impeding justice within the meaning of U.S. Sentencing Guidelines §3C1.1 or has failed to make any court appearances in this case, from the date of the Defendant's signing of this plea agreement to the date of the Defendant's sentencing, or if the Defendant attempts to withdraw his plea, the Government will be released from its obligations and would become free to argue for any sentence within statutory limits. Such a breach by the Defendant would not release the Defendant from this plea of guilty.

5. The Defendant further understands and agrees the special assessment is due and payable to the U.S. District Court Clerk's Office immediately following the Defendant's sentencing.

6. This writing contains the entire Plea Agreement between the Defendant and the Government with respect to his plea of guilty. No additional promises, representations or inducements other than those referenced in this Plea Agreement have been made to the Defendant or to his attorney with regard to this Plea, and none will be made or entered into unless in writing and signed by all parties.

_____ 06-17-09
JAE LEE Date
Defendant

_____ 6-17-09
LARRY FITZGERALD, ESQ. Date
Attorney for Defendant

LAWRENCE J. LAURENZI
UNITED STATES ATTORNEY

By _____ 6/17/09
ARUN G. RAO Date
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
MEMPHIS DIVISION

UNITED STATES OF AMERICA	**2:09CR20011-01-D (Redacted Version)**
-v-	**Larry E. Fitzgerald, Retained**
JAE LEE	**Defense Attorney 100 North Main Street, Suite 901 Memphis, TN 38103**

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant pleaded guilty to Count 1 of the Indictment on June 17, 2009. Accordingly, the court has adjudicated that the defendant is guilty of the following offense:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
21 U.S.C. § 841(a)(1)	Possession with the Intent to Distribute MDMA (Ecstacy)	01/07/2009	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Date of Imposition of Sentence:
September 28, 2009

s/ Bernice B. Donald
BERNICE B. DONALD
UNITED STATES DISTRICT JUDGE

September 29, 2009

Defendant's Date of Birth: 1969
Defendant's Soc. Sec. No. xxx-xx-6662
Deft's U.S. Marshal No.: 22715-076

Defendant's Mailing Address:

Cordova, TN

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **12 Months and 1 Day**. (Delay Service of Sentence to after January 30, 2009.)

The Court recommends to the Bureau of Prisons:

– Placement at FPC Millington, Tennessee.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 Years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthful all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
5. The defendant shall notify the probation officer **ten(10) days prior** to any change in residence or employment;
6. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;
7. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered; The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any

person convicted of a felony unless granted permission to do so by the probation officer;

8. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

9. The defendant shall notify the probation officer within **72 hours** of being arrested or questioned by a law enforcement officer;

10. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

11. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

12. If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1) Participate in substance abuse testing and treatment as directed by the Probation Officer.

2) Cooperate with DNA collection as directed by the Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment	Total Fine	Total Restitution
$100.00	$5000.00	

The Special Assessment shall be due immediately.

FINE

A Fine in the amount of $ 5000.00 is imposed.

RESTITUTION

No Restitution was ordered.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAE LEE, Movant, v. UNITED STATES OF AMERICA Respondent.	)	Case No.: _____ (2:09-CR-20011-D)

MOTION PURSUANT TO 28 U.S.C. §2255 TO VACATE CONVICTION AND SENTENCE

Movant, JAE LEE ('LEE'), pro se, respectfully moves pursuant to 28 U.S.C. §2255 to vacate his guilty plea, conviction, and sentence in Case No.2:09-CR-20011-D. As set forth herein, LEE relies primarily on the recent holdings enunciated by the Supreme Court in Padilla v. Kentucky, WL 1222274 (2010).

JURISDICTION

On January 28, 2009, LEE was indicted on one (1) count of "Possession With Intent To Distribute MDMA," pursuant to 28 U.S.C. §841(a)(1). (DE:2; Appdx:1a)[1] On June 17, 2009, LEE entered a plea of guilty to the aforesaid indictment based upon a plea agreement. (DE:21; Appdx:17a-19a) On September 28, 2009, LEE was sentenced to one (1) year and a

[1] Unless otherwise noted, citations to "DE" refer to the Docket Entries of the underlying criminal case (No.2:09-CR-20011-D). References to "Appdx" refer to specific documents that appear in the "Appendix of Exhibits" which was *separately* filed in support of the instant motion.

day, plus three (3) years supervised release. (DE:25; Appdx:53a-73a) The attendant Judgment and Commitment Order was entered on September, 29 2009. (DE:27,30; Appdx:20a-29a) LEE did not pursue a direct appeal. Furthermore, this is LEE's first §2255, and it has been filed *within* the one-year limit governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). This Court thus has jurisdiction. See 28 U.S.C. §2255.

SUMMARY OF ARGUMENT

LEE asserts his guilty plea, sentence and conviction were rendered in violation of his Sixth Amendment guarantee to effective assistance of counsel. Accordingly, this case is first governed by the protocols of Strickland v. Washington, 466 U.S. 668 (1984), which require a defendant to demonstrate "counsel's performance was deficient" and that "counsel's unprofessional errors prejudiced the defense." Id. at 687.

As to Strickland's first prong, LEE must show the representation provided by his counsel, Larry E. Fitzgerald, esq., "fell below an objective standard of reasonableness," as measured by "prevailing professional norms." Id. at 688. In this regard, LEE respectfully submits that such a determination should be uncontroversial due to two (2) factors. First, the Supreme Court recently held in Padilla v. Kentucky, WL 1222274 (2010), that performance is deficient under Strickland when an attorney fails to advise the client that deportation is a likely consequence of his/her guilty plea.

Secondly, the facts of this case establish Fitzgerald not only failed to advise LEE that deportation was virtually a certainty if he pleaded guilty,

but that Fitzgerald actually *affirmatively misadvised* LEE (who had been a legal resident of the United States for the past 30+ years since his arrival as a child) that he would *not* be deported if he accepted a plea. Indeed, upon the unexpected realization by LEE several months *after* sentencing that INS was planning to deport him upon conclusion of his sentence, Fitzgerald even sent a letter for LEE to provide INS, stating: "There was never any discussion of deportation during the negotiation of the Plea Agreement or during Sentencing. It was my understanding the Government was not seeking Deportation of Mr. Jae Lee." (Infra; also Appdx:86a-87a) As well, the record shows that even the prosecutor and Court did not realize LEE risked deportation. (Infra; also Appdx:53a-73a)

Beyond deficient performance, however, LEE must still also satisfy Strickland's second requirement of demonstrating counsel's errors caused him "prejudice." For guilty pleas this requires a showing of "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and instead insisted on trial." Hill v. Lockhart, 474 U.S. 52 (1985). This Court's determination is based upon an "objective inquiry" into the likely outcome of a trial had LEE not pleaded guilty. Id.; see also Railey v. Webb, 540 F.3d 393 (6th Cir.2008). It is important to distinguish, however, that to establish prejudice, LEE need not show with absolute certainty that a jury would have acquitted him, but demonstrate only that there was a reasonable potential for a favorable outcome. See Dando v. Yukins, 461 F.3d 791 (6th Cir.2006).

As to the foregoing, LEE respectfully submits that the record and evidence will demonstrate he had

an extremely meritorious defense had he gone to trial. That is, relatively speaking as far as federal drug prosecutions go, this was a very minor drug case involving a seizure of only eighty-eight (88) Ecstasy pills. Moreover, all of the evidence (provided through discovery that is), including the oral statements of LEE and other witnesses, showed that LEE possessed the pills for *personal use,* and "did not sell the Ecstasy to anybody, [but] would give it away when he would go out to party with friends." (Infra; see also DE:16; Appdx:3a, 12a)

In fact, even after allowing the Government to include every imaginable manner of relevant conduct into the PSI, the grand total of aggregate Ecstasy pills that could be mustered against LEE was only three-hundred (300) pills, extended over an eight (8) year period no less. Pertinently, Lee was not charged with simple "possession" of MDMA, but was charged and pleaded guilty to "Possession With Intent To *Distribute* MDMA" - a qualifying offense under Immigration Law triggering virtually automatic deportation.

Secondly, the PSI revealed that there was the potential (at best) for the Government to use the testimony of a Confidential Informant (CI) regarding some prior transactions. In fact, it was through this nexus that the Government used the relevant conduct provisions of the Guidelines to increase the amount of Ecstasy pills from eighty-eight (88) to three-hundred and three (303). Notwithstanding its use for relevant conduct purposes, however, the CI-nexus was *never* mentioned anywhere in the Government's Rule 16 Discovery Response Letter, nor even in any of the DEA Investigation Reports filed in this case. (DE:16; Appdx:3a-16a) Moreover, when asked

at the plea change hearing what the evidence at trial *would* have been had LEE not pleaded, the Government again made no mention of the CI, but instead relied *exclusively* on the eighty-eight (88) Ecstasy pills retrieved from LEE *personally*, and that to prove the "distribution" element, experts would have purportedly testified that an amount eighty-eight (88) pills was consistent more with a trafficker than personal use. (Infra; also DE:20; Appdx:45a-46a)

Accordingly, as distinguished herein as relevant to LEE's prejudice-prong argument, as a threshold matter, the law-of-the-case doctrine and discovery rules make it far from liquidated that the Government could now suggest in these §2255 proceedings that the PSI-constrained mention of the CI and events related to him for "relevant conduct" purposes could have been used against him to demonstrate proof of distribution rather than possession, and thus, should be included as part of this Court's objective assessment into whether LEE could have advanced a plausible defense if he had gone to trial. That is, the Government's failure to disclose in its Discovery Response or DEA Reports that a CI would be used at trial should have prohibited them from doing so. F.R.C.P. Rule 16.

Nevertheless, what makes LEE's §2255 claims particularly compelling are that, even if one were, *in arguendo*, to gratuitously include a presumption the Government could have somehow engineered a way to insert the undisclosed CI-nexus into a trial prosecution, LEE can still *surpass* his burden of establishing he possessed a plausible defense and reasonable potential of a favorable trial outcome. Specifically, had the Government sought to use the CI and events related to him to prosecute LEE for a

"distribution" case, discovery rules would have required the Government to disclose the several instances where the CI had proved to be unreliable - if not outright scandalous - while working for law enforcement in numerous instances and even other cases. (Infra; also Appdx:88a-93a)

Furthermore, the Government would have also been required to provide copies of "audio recordings" between the CI and LEE which, as this Court will observe, were also never mentioned in the Government's Rule 16 Discovery Response Letter or evidence proffer. Pertinently, these recordings would have engendered severe credibility problems with any testimony of the CI, as well as made an *extremely* strong entrapment defense available to LEE. More relevantly, however, the required hand-in-hand disclosures relevant to the CI would have not only produced more harm than benefits in any prosecution of LEE, but would have resulted in damage to ongoing and *related* prosecutions of much more serious, high-level, drug traffickers. (Infra; also Appdx:88a-93a) Simply put, LEE submits that the Government's omission of any mention of the CI or the alleged controlled buy were not mere oversights, but were *strategic* omissions actually based upon an inability to effectively use the CI in this case, as well as other much more important ones.[2]

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[2] Indeed, although LEE did not learn of it until after sentencing, it was later discovered that use of the CI had become so problematic and undesirable for the Government that LEE's arrest was done so prosecutors could essentially use him as a surrogate for the CI in order to extract pleas and co-operation from the numerous high-level drug traffickers they were planning to, and did later prosecute. (Infra; also Appdx:88a-93a)

Independent of the foregoing issues, but nonetheless cumulative, LEE also asserts two (2) additional claims relevant to his ineffective assistance arguments. First is that Fitzgerald failed to conduct an adequate investigation *relevant* to the advice he gave to LEE to plead guilty rather than go to trial. As to this sub-argument, LEE relies on both Strickland, as well as Wiggins v. Smith, 539 U.S. 510 (2003), which held counsel's decision not to investigate is only reasonable if professional judgment demonstrated particular investigations were unnecessary. Id. Here, the record shows Fitzgerald conducted no investigation into the case, possible defenses, witnesses, or discovery. In fact, Fitzgerald did not even request to see a copy of the search warrant or its supporting affidavit, much less raise the substantial 4th Amendment grounds which existed to challenge validity (infra).

Thus, as applied to the law, Fitzgerald's decision not to investigate anything and instead recommend what amounted to a "low risk" convenience plea cannot be given deference or deemed strategic. This is because Fitzgerald's advice was based on his misunderstanding of the law and misrepresentations to LEE that he would not be deported if he accepted the plea. See Bradshaw v. Stumpf, 545 U.S. 175 (2005) (guilty plea operates as a waiver of important constitutional rights and must be an informed choice among all available alternative courses of action); North Carolina v. Alford, 400 U.S. 25 (1970)(guilty plea must be voluntary, knowing, and intelligent, with sufficient awareness of relevant circumstances and likely consequences); see Dando, supra, 461 F.3d at 799 (decision not to investigate and instead recommend plea was *not* sound professional judgment because it was based upon counsel's misunderstand-

ing of law). Moreover, Fitzgerald's misunderstanding was critical. See INS v. St. Cyr, 533 U.S. 289, 323 (2001)(recognizing that preserving client's right to remain in the United States may be more important than any potential jail sentence").

Lastly, LEE separately asserts that Fitzgerald also rendered constitutionally deficient performance at sentencing when he misadvised the Court he was a "citizen of the United States," when LEE clearly was not. (Infra; also Appdx:62a) Concerning this, LEE must establish there is a reasonable probability he would have received a different sentence. Porter v. McCollum, 130 S.Ct. U.S. 447, 453 (2009). As detailed infra, by Fitzgerald's misinforming that LEE was a U.S. citizen, the Court was deprived of the knowledge of a commonly relied-upon factor used by Court's consistent with their sentencing discretion under the *advisory* Guideline regime.

FACTUAL AND PROCEDURAL HISTORY

The Search Warrant Execution

According to the Drug Enforcement Agency (DEA) Investigation Report submitted by the Government through discovery, on January 7, 2009, at approximately 6:00 a.m., members of a DEA Joint Task Force, including Tennessee State and local law enforcement, executed a federal search warrant on LEE's residence. (DE:16; Appdx:9a-16a) Agents searched the resident and retrieved a loaded rifle; $32,432 in U.S. Currency contained in a "blue bag;"[3]

---

[3] LEE owned two (2) restaurants and the "blue bag" was a bank-issued depository bag.

and eighty-eight(88) MDMA (Ecstasy) pills. (DE:16; Appdx:9a-16a)[4]

With respect to the "oral statements" of LEE and Amy Chu (LEE's girlfriend of twelve (12) years), the DEA Report stated:

> "Prior to transporting LEE to the Memphis Resident Office, LEE advised TFO's Brunson and Stauffer that all of the narcotics recovered from the residence were his. LEE further stated he had used both the vehicles [located and at his residence] to transport the narcotics when he would go out to party with friends. LEE stated that he did not sell the Ecstasy to anybody, but would give it away. LEE stated that he smoked marijuana on a regular basis; however, he had used what little marijuana he had prior to the officers/ agents executing the search warrant at his residence.

---

[4] Relevantly, LEE disputes eighty-eight (88) Ecstasy (MDMA) pills were recovered, but that it was actually only eighty-five (85). Lee attributes this to agents either miscounting, or possibly aggregating in three (3) prescription-authorized, Valium tablets also recovered. (See DEA Report, pg# 3 of 7; or Appdx:11a). Consistent with the possibility agents miscounted or made errors is that the DEA Report reflects their misstating throughout with the numeric notations of "(80)," but inconsistently also using the wording of "eighty-eight." (See DEA Report at pgs# 3, 5; or Appdx:11a-13a) Moreover, when observing the "DEA's Drug Property Report," the weights listed seem incorrect (i.e. only eight(8) MDMA pills weighed 26.2 grams, whereas an identical eighty (80) tablets (being ten times that amount) weighed just 48.8 grams). (SEE DEA Report, Appdx:16a)

> . . . TFO Stauffer then advised Amy CHU of her Miranda Rights. . . CHU stated that she had used Ecstasy and Marijuana with LEE. CHU stated that she never purchased narcotics. CHU stated that LEE would give it to her when they were partying. CHU stated that she had no knowledge of LEE's narcotic trafficking. CHU was released at the scene." (emphasis added)(DE:16, pg# 4-5; Appdx:12a-13a)

Lee's Arrest & Indictment

As a result of the aforesaid search warrant execution and recovery of the eighty-eight (88) Ecstasy pills, LEE was arrested and charged by the State of Tennessee (See Tenn. v. Lee, Case No. 09100717), but was released immediately on bond. To represent him in the State Case, LEE privately retained Fitzgerald. Three (3) weeks later, however, the federal government elected to assume the case. Accordingly, a federal indictment was returned against LEE on January 28, 2009, for a single count of "Possession With Intent To Distribute MDMA (Ecstasy) pursuant to 28 U.S.C. §841(a)(1)." (DE:2; Appdx:1a) The Tennessee State case was thus later dismissed. See Tenn. v. Lee, supra.

After the issuance of the indictment, federal agents went to one of LEE's restaurants to take him into custody on January 30, 2009. (DE:6) Fitzgerald advised LEE he also did "federal work," and thus, LEE elected to keep him as counsel. The Government initially sought pretrial detention, however, upon conducting hearing, the Magistrate granted LEE's release based upon his agreeing to pay a $1,000 cash deposit with the Court, standard release conditions, and the requirement he surrender his passport. (DE

6-11) The $1,000 deposit and surrender of his passport to Clerk was done the same day and LEE was released. (Id.) Pertinently, the Clerk issued a receipt of "Foreign Passport," which was serviced upon Fitzgerald and clearly showed LEE was a "citizen of Korea." (DE:12; Appdx:2a)

The Government's Rule 16 Discovery Letter & Attachments

Approximately one (1) month later, on March 3, 2009, the Government issued its "Rule 16 Discovery Response Letter," wherein the AUSA outlined the evidence and witnesses the Government intended to use at trial. Specifically:

> (i) all of the physical evidence seized through the federal search warrant;
>
> (ii) LEE's prior criminal history (which constituted only a misdemeanor Public Intoxication and Disorderly Conduct charge from sixteen (16) years earlier);
>
> (iii) laboratory analysis and expert testimony relevant to the eighty-eight (88) Ecstasy pills seized by the warrant; and
>
> (iv) the "oral statements" made by LEE in the presence of agents at the scene of the search warrant raid that: "all of the narcotics from the residence are mine. I did not sell the Ecstasy to anyone. I gave it away." (DE:16; Appdx:3a-16a)

Attached to the Government's Discovery Response was a copy of the DEA Report discussed supra, at pgs# 9-10. (See also DE:16; Appdx:9a-16a) As can be observed, although the Discovery Response and DEA Report mention a search warrant was

executed, nowhere was copy of that warrant ever provided, nor any explanations given revealing any of the background into what grounds that warrant was supposedly obtained. That is, completely absent from the Discovery Response and DEA Report were any mentions whatsoever a CI was involved or that the warrant was precipitated by events and information allegedly related to him. Rather, as becomes relevant to the "prejudice prong" analysis *infra*, it wasn't until the PSI (conducted *after* the plea change) that this ever appeared.

The Pre-Trial Proceedings & Plea Negotiations

As early as three (3) weeks after the Government's Discovery submissions, the record reflects Fitzgerald at the first status conference was already foretasting that this "relatively minor case" would likely result in LEE's acceptance of a plea agreement. (DE:18). In the weeks thereafter, Fitzgerald made representations to LEE concerning what the Government intended to offer, as well as what the likely sentence and consequences were that LEE could expect. (See Declaration of LEE, Appdx:88a-93a). In this regard, Fitzgerald advised that in light of LEE's lack of criminal history; the small amount of Ecstasy; application of the "safety-valve;" etc., he would likely get "probation or house-arrest." (Id.)

Importantly, in that LEE had been a *legal* resident of the United States for more than thirty years since his arrival as an child, he *expressly* inquired whether there was "any possible chance" he could loose his legal status and be deported. (Id.) To this, Fitzgerald advised that the Government had not said that they would seek his deportation, as well as that because LEE had lived so long in the United States, he (Fitzgerald) was "certain" the Government could

not get LEE deported "even if they wanted to." (Id.) Nevertheless, LEE advised that before he agreed to any plea deal that Fitzgerald had to "make sure" there was no chance of deportation. (Id.)

In the weeks that followed, Fitzgerald inquired of LEE what he intended to do about his case. When LEE asked for his legal recommendations, Fitzgerald advised that LEE likely could make out a strong case for simple possession instead of distribution, as well as that the unseen search warrant "might" be challengeable once the supporting affidavit was reviewed, but that there was always a "litigation risk" of losing at trial. (Id.) In this vein, Fitzgerald advised that if LEE lost a trial he could face "three to five years in prison," as well as cause the Government to "decide to seek his deportation;" whereas, according to Fitzgerald, if LEE accepted a plea he would get probation or house arrest and *not* risk any deportation. (Id.) That is, Fitzgerald *affirmatively* advised LEE that in exchange for his guilty plea, the Government had agreed: "to recommend the maximum early acceptance reduction;" "not to object to the safety-valve;" and "not seek deportation." (Id.)

It was based only upon the foregoing assurances from Fitzgerald that LEE agreed to plea guilty and not pursue his right to jury trial and valid trial defenses. (Id.) Moreover, according to Fitzgerald, because LEE was going to plea, the Government purportedly was not obligated to provide a copy of the search warrant or supporting affidavit. (Id.) In short, Fitzgerald made the decision no efforts to investigate defenses, witnesses, discovery, etc., were needed in light of LEE's decision to plead.

The Plea Agreement

At the very next status conference, on May 21, 2009, the Government and Fitzgerald represented that a "deal" had been reached. (DE:19) Accordingly, the Court scheduled a "Plea Change Hearing" for June 17, 2009. (Id.) It was not until a few days before the hearing, however, that Fitzgerald provided LEE with a copy of the Plea Agreement, which outlined the following terms for LEE's plea to one (1) count of a violation of 21 U.S.C §841(a)(1):

> (i) the Government would jointly recommend he receive a three-level reduction for acceptance of responsibility;
>
> (ii) the Government would not object to a finding he qualified under the safety-valve;
>
> (iii) the Government had not made any promises or representations as to what sentence would be imposed;
>
> (iv) if LEE committed or attempted to commit any additional crimes or obstructed or impeded justice, then the Government was free to argue for any sentence in statutory limits; and
>
> (v) that the "special assessment" was due and payable immediately following sentencing. (DE:21; Appdx:17a-19a)

While reviewing the plea agreement, LEE again *expressly* sought assurances from Fitzgerald that there was no risk of losing his legal alien status or being deported. (See Declaration of LEE, Appdx:88a-93a) As to this inquiry, Fitzgerald again not only advised LEE his legal status, ties, and 30+ years in the United States purportedly made it "impossible"

to obtain his deportation based on this "minor drug case," but that he had confirmed that the Government were "not in any way going to be seeking deportation." (Id.) Indeed, Fitzgerald claimed that if the Government had wanted to include deportation as part of the sentence, it would have "had to been included within the Plea Agreement." (Id.) Thus, as Fitzgerald explained, because the plea agreement was "binding" on the Government, the non-inclusion of any deportation purportedly "fully protected" LEE. (Id.) Based only on the foregoing representations did LEE sign the plea. (Id.)

The Plea Hearing

On the morning of the plea change hearing, Fitzgerald advised LEE that the Court was going to ask him a series of "standard questions and warnings," which the law required him to say he "understood" in order for his plea to be accepted, but what "really mattered most was what the plea agreement states, because that's what is binding." (See Declaration of LEE, Appdx:88a-93a)

At the hearing itself, the Court began with a series of standard advisements. For example, this included inquiring if LEE was aware that the offense to which he was pleading carried "a maximum penalty of 20 years, plus a maximum fine of one million dollars." (DE:20 at pg# 8-9; Appdx:37a-38a) To this, LEE *promptly* responded: "Yes, Your Honor." (Id.) Next, the Court advised: "[t]his is a felony offense, and if you are convicted of this felony offense, whether it's by trial or by plea, it could have certain negative affects on your civil rights, you could lose the right to vote, the right to possess and carry a firearm, the right to serve on a jury, and the right to stand for certain public offices. Knowing those

important rights and/or benefits could be affected, are you still wishing to go forward and plead guilty?" (DE:20 at pg# 9; Appdx:38a) To this, LEE again *unhesitatingly* responded: "Yes, Your Honor." (Id.)

After that the Court then asked: "Are you a U.S. Citizen?," to which LEE responded "No, Your Honor." (Id.) Accordingly the Court then advised: "Okay. A conviction on this charge then could result in your being deported. It could also affect your ability to attain the status of a United States citizen. If you do become a United States Citizen, it could affect your rights to participate in certain federal benefits, such as student loans. (DE:20 at pg# 9-10; Appdx:38a-39a) Despite having no hesitation with any of prior inquiries, when the Court asked: "Does that at all affect your decision about whether you want to plead guilty or not?", LEE in this instance clearly stated: "Yes, Your Honor." (Id.) As such, the Court then inquired: "Okay. How does it affect your decision?", to which LEE advised: "I don't understand." (Id.)

At this point, Fitzgerald spoke "quietly into [LEE's] ear," advising him the Court was just giving him a "standard warning" given to every non-U.S. Citizen, but reminding that the Government had confirmed they were "not going to seek deportation," as well as that the "binding" plea agreement itself did not include that LEE would be deported as part of his sentence. (See Declaration of LEE, Appdx:88a-93a) After Fitzgerald's quiet consolations, the Court then re-inquired: "Okay. Well, knowing these things do you still want to go forward and plead guilty?," to which LEE only now responded: "Yes, Your Honor." (DE:20 at pg# 10; Appdx:39a)

The Court then proceeded to have the Government "summarize the terms of the plea agreement."

(DE:20 at pg# 10-15; Appdx:39a-43a). LEE then likewise confirmed he had "discussed the plea agreement" with [Fitzgerald]; that Fitzgerald had "answered any questions;" and he had signed the plea agreement of his "own free will". (Id.) Lastly, the Court instructed the Government to proffer what its proof would have been at any trial. (DE:20 at pg# 16-17; Appdx:45a-46a) Relevantly, just as the Government's Rule 16 Discovery Letter and DEA Report, again no mention was made of a CI-nexus. Rather, the AUSA claimed the evidence at trial to prove "Possession With Intent To Distribute," would have solely been:

> "Had this matter proceeded to trial the government would have established that on January 7, 2009, members of law enforcement executed a federal search warrant [at] the defendant's residence. Inside they found in the living room area $32,432. And in the dining area eight MDMA tablets in a cigarette box on the bookcase. And 88 additional MDMA tablets in a plastic bag on the bookcase. Those tablets field tested positive for the presence of MDMA.
>
> According to members of law enforcement, in their training and experience, the amount of MDMA recovered was consistent with distribution rather than personal use. The defendant was arrested in the residence and spoke with law enforcement and

admitted that the MDMA tablets belonged to him." (DE:20 at pg# 16-17; Appdx:45a-46a)[5]

The Court thereafter accepted LEE's change of plea. (DE:20, pg# 18-19; Appdx:46a) A sentencing hearing was scheduled and Probation ordered to prepare a Presentence Report (PSI). (Id.)

The PSI

Importantly, the record shows it was only in the PSI that the first mention was ever made in this case about the existence of a CI, an alleged "controlled buy" and an "audio recording." (PSI:4-7) Specifically, based on information provided by Case Agents, Probation detailed that sometime in mid-2008, a CI cooperating with law enforcement advised he had known LEE for the past twelve (12) years, and that LEE had "been involved in drug trafficking since 1999." (PSI:4)

Despite the CI had known LEE for more than a decade, the history of alleged drug transactions the CI could recount was limited to have allegedly bought "one ounce of hydroponic marijuana," on "two occasions for $350 an ounce," as well as "approximately 200 Ecstasy (MDMA) pills."(PSI:4) Relevantly, however, the PSI detailed the approximately two-hundred (200) Ecstasy pills allegedly obtained by the CI from LEE were spread across forty (40) separate transactions during an eight (8) year

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[5] The prosecutor misread the DEA report as stating eight (8) pills and eighty-eight (88) pills (i.e. ninety-six (96) pills) were retrieved, however, when the report is reviewed carefully, it shows less (i.e. eighty-eight (88) pills), despite that even that number was wrong as well. (See supra, at pg# 8-9, n.4, for details)

period; that is, "approximately, 5 occasions in 2001; 5 occasions in 2002; 5 occasions in 2003; 5 occasions in 2004; 7 occasions in 2005; 5 occasions in 2006; 6 occasions in 2007; and 2 occasions in 2008." (Id.) Thus, although the CI could not recount what the actual amounts were for each transaction, logic dictates that with the two-hundred (200) pills spread across an eight (8) year period and forty (40) separate transactions, each occasion must have only involved a small number of pills (i.e. 5 pills) each time.[6]

The case agents also reported that the CI had claimed he owed LEE "$150 for an existing drug debt." (PSI:4)[7] Based on this claim, agents provided the CI with $150 in Government funds and instructed him to meet with LEE and "settle the debt." (Id.) On December 2, 2008, agents claimed they observed the CI entering LEE's residence, where he remained for approximately ten (10) minutes. (Id.) Although agents did not see the transaction themselves, the CI later reported to agents that he paid the debt, as well as that, while there, he also observed LEE allegedly packaging fifteen (15) Ecstasy tablets into a cellophane wrapper. (Id.)

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[6] The CI did not begin working with law enforcement until mid-2008, and thus, all the transactions recounted by the CI allegedly occurred before his own arrest and before his cooperation with the agents began.

[7] The PSI does not distinguish for what the drug debt related. However, LEE claims it was due to him and the CI having previously agreed to *split* on an ounce of marijuana which the CI smoked, but never provided the money to cover his share. (Declaration of LEE, Appdx:88a-93a)

Approximately nine (9) days later, on December 11, 2008, agents provided the CI with $300 in government funds to conduct a "controlled buy" of fifteen (15) Ecstasy pills. (Id.) According to the agents, "the CI was outfitted with a recording device and placed under visual surveillance to conduct the transaction." (Id.) Upon return from the alleged transaction, the CI advised he had purchased the fifteen (15) Ecstasy pills from LEE. (Id.) Agents did not, however, provide Probation any details as to what the contents of the alleged "recording device" contained. (Id.)

Subsequent to the information related to the CI, the PSI only then proceeded to recite the events related to the execution of the actual search warrant, retrieval of the eighty-eight (88) Ecstasy pills, the oral statements of LEE, etc. (Id.) This *post-CI* information tracked the same as what appeared in the Government's Rule 16 Discovery Response and accompanying DEA Report discussed previously herein, at pgs# 9-12, supra. Thus, it was through this previously *undisclosed* CI nexus involving the two-hundred (200) Ecstasy pills allegedly purchased from LEE in the eight (8) years prior, plus the alleged fifteen (15) pill controlled buy, that the PSI was able to use relevant conduct provisions to aggregate the amount of pills for sentencing purposes to be three-hundred and three (303) pills, rather than just the eight-eight (88) Ecstasy pills which formed the actual offense of conviction. (PSI:5)[8]

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[8] For clarification, LEE does not dispute the inclusion of the CI-nexus into the PSI was potentially permissible for relevant conduct considerations. Rather, LEE's legal argument is that its non-disclosure in discovery and evidence proffer at the plea

[Footnote continued on next page]

As to calculations, the PSI hence determined that the base offense level was eighteen (18), to which two (2) levels were added for possession of the firearm. (PSI:6) No further aggravating enhancements were found. (Id.) From the adjusted offense level of twenty (20), three (3) levels were reduced for early acceptance of responsibility. (Id.) However, although the plea agreement included that the Government would "not object to the two-level safety valve if the defendant qualified," the PSI explained the presence of the gun at the residence "automatically disqualified" LEE for the provision, despite that Fitzgerald had represented to LEE that he would, in fact, be receiving it. (Id.; see also pg# 14-16, supra) Accordingly, with the adjusted base offense level remaining at seventeen (17), and with no criminal history, the recommended advisory guideline range was 24-30 months. (Id.)

Approximately ten (10) days before sentencing, the Government filed notice that they had no objections to the PSI. (DE:23) Three (3) days before sentencing, Fitzgerald provided the PSI to LEE for review and comment. (See Declaration of LEE, Appdx:88a-93a) Of course, LEE's *preliminary* concern was that the safety-valve had not been given and the range of 24-30 months was certainly more than the forecast of probation or house arrest. (Id.) Additionally, however, LEE expressed detailed

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change hearing raises questions as to whether it can now be said to have been part of what would have used to prosecute LEE to prove a *distribution* case at trial. Put simply, for purposes of the legal analysis herein, there is a big difference between "offense conduct" and "relevant conduct."

concerns about the untrue and inaccurate claims being made in the PSI relevant to the CI.

In response to LEE's concerns, Fitzgerald conceded he had "not realized" LEE would be "automatically disqualified" for the safety-valve, but that the advisory nature of the Guidelines and judicial discretion made it "very likely the Court would still issue a below-guideline sentence based on the insignificant nature of the case." (Id.) In any event, according to Fitzgerald, even if "some incarceration time were issued," it would *"not* be more than one-year," which could then be reduced through the "drug program and half-way house," as well as LEE would be able to serve his minimal custody time at a "Prison Camp near his residence." (Id.) The foregoing were, of course, the most important considerations to LEE at the time because LEE was still operating under the belief he would not lose his legal status or be deported, and thus, the thrust of LEE's concern was about how his restaurants would be impacted during the period he would be away from them.

As to LEE's concerns about the inaccurate and untrue claims in the PSI about the CI, LEE reported the following inconsistencies:

> (i) the CI had never paid the $150 debt in the way he claimed;
>
> (ii) that the CI was a "mooch" and that LEE had never sold him any Ecstasy;[9]

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[9] According to LEE (and other witnesses), the CI would always show-up when friends were partying and would "mooch" free drugs, as well as that even when the CI claimed he was going "chip in" his own money to cover costs of buying drugs for

[Footnote continued on next page]

(iii) on the occasion the CI falsely claimed to have paid the $150 debt, the CI had *not* seen LEE packaging any pills because LEE had not had any;

(iv) that at the aforesaid occasion, the CI had told LEE he really needed some pills to party with a girl he had met, but that LEE had none because, as LEE advised the CI, he was trying to cut down on doing Ecstasy and hadn't bought any for a while because his restaurant businesses had slowed down;

(v) that contrary to what the CI later reported to agents, the CI left LEE's residence without paying the debt, and instead only "offered" to do so, as well as "cover the cost" of the 15-20 pills he needed to party with, but that LEE still advised the CI he didn't want to get him any pills because he (LEE) was trying to quit taking Ecstasy due to having become an "expensive habit;"

(vi) that in the days that followed, the CI *repeatedly* telephoned LEE asking he reconsider getting him some Ecstasy "as a favor" so he could party with his new girlfriend, but that on at least *three* (3) *dozen occasions*, LEE still refused;

(vii) that ultimately, after a week of repeated and persistent calling, LEE ultimately acquiesced and agreed to get the CI some Ecstasy pills so that the CI would stop "stalking" him

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partying, he would never follow-through and leave LEE with the costs. (Declaration of LEE, Appdx:88a-93a)

for the pills to party with his girlfriend, but that the CI needed to cover the costs and pay for the marijuana ounce they had previously split;

(viii) that LEE then went and bought pills from his "source," and (as he usually did) had to buy one-hundred (100) tablets in order to get the price of $20 per pill, rather that $30 per pill (i.e. $2000 versus $3000);[10] [11]

(ix) that when LEE contacted the CI to pick up the fifteen (15) pills he requested and bring the $450 he owed (the prior $150 for the split on the marijuana, plus the $300 to cover the costs for the pills the CI wanted), the CI told LEE to come to the CI's house and pick-up the money in his mailbox;

(x) that when LEE (with a companion) arrived at the CI's house and went into the mailbox, an envelope containing only the $150 for the marijuana debt was enclosed (i.e. the same $150 he had already untruthfully reported to agents he had paid LEE a week earlier), along with a handwritten note

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[10] According to LEE, he was going to use the rest of the pills for partying with friends which, with each person consuming 3-5 pills, would have only lasted him only a month or two. However, as discussed infra, consistent with his claims of wanting to quit, after giving the fifteen (15) pills to the CI, LEE never used any of the one-hundred pills that he had left, let alone sell them to anybody. (Declaration of LEE, Appdx:88a-93a; also infra).

[11] Relevantly, as would be later discovered, LEE's source was a "Lum Gum," an actual drug-trafficker who agents were actually interested in, and which they later prosecuted (details infra).

which stated that "this is all I have right now;"

(xi) that upon LEE contacting the CI and asking where the rest of the money was for the pills he wanted, the CI advised he would come by LEE's house and pick them up the next day;

(xii) that when the CI did come to pick-up the fifteen (15) pills and pay, LEE engaged in a discussion about the $150 being left in the mailbox (instead of the $450), and that this was the type of "B.S." that had caused LEE not to want to do him any "favors" in the first place;

(xiii) that during the same discussion, LEE reiterated to the CI that he was really trying to "cut-back" on taking Ecstasy, and that this had been the "first time in a very long time" he had even gone to his source (Gum Lum) for pills;

(xiv) that LEE could produce numerous witnesses for Fitzgerald who would testify not only that LEE would never sell them drugs but give them away, as well as that the CI was a "mooch" and "free-rider;" and

(xv) that the PSI stated agents claimed the CI had been outfitted with a recording device, and thus, Fitzgerald should obtain the audio recordings (which were never disclosed in discovery) because they would have revealed: (a) the CI had lied about seeing him package pills, paying the debt, having bought pills in the past eight (8) years (as opposed to being given them for free to

> party), etc.; and (b) that LEE had only got the pills as a favor for the CI because he persisted in calling him more than three (3) dozen times and begging for his help so he could part with a new girlfriend he had met. (See Declaration of LEE, Appdx:88a-93a)

In response, Fitzgerald advised "these things always popped up during the PSI process," but that spending time challenging the inconsistencies was unnecessary because, according to Fitzgerald, the small amount of MDMA pills "with or without" the CI claims "would not change the ultimate sentence," and thus, it would be better to focus efforts on LEE's personal characteristics and using them to get the lowest sentence possible. (Id.) [12]

The Sentencing

At the sentencing hearing, without objection from the parties, the Court reviewed and adopted the PSI findings, calculations, and the recommended 24-30 month range. (DE:25 at pgs# 7-9; also Appdx: 59a-61a) The Court then requested Fitzgerald proffer his arguments concerning the "3553(a) factors." Fitzgerald stated:

> "Your Honor, Mr. Lee up to this point, Your Honor, had been an exemplary citizen of the United States. He has been here since he was 12 years old, currently came her with a language barrier, has done very well for

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[12] Fitzgerald also advised LEE that his concern about only eighty-five (85) pills being retrieved as opposed to eighty-eight (88) was also "not worthy of challenging" because it would "not have impacted the advisory guideline range calculations." (Id.; see also, supra pg# 19, n.5 for further details)

himself, opened up - came to Memphis, Tennessee some years ago and had opened up two restaurants, been doing quite well for himself except for this, I guess, what I call one glitch, one glitch, Your Honor. . . Well, Your Honor, We're talking about 300 tablets, Your Honor, that - that's 300 tablets of ecstasy, Your Honor, I mean, that's not - I guess, even if you took it over a ten year period, what are we talking about, 30 pills a year. I'm saying that it is serious maybe over a period of time, but I'm saying it's not a lot, that's all I'm saying, Your Honor. . . Although he was - he was making a living, when you look at his financial condition, it is not one that looks like he's in - he has a negative $12,000 as far as his assets and liabilities are concerned. So he has been making a living but he hasn't been able to just - he's not rich, Your Honor, and not wealthy in any sense of the word." (emphasis added) (DE:25 at pgs# 10-12; Appdx: 62a-64a)

The Government then provided its outlook on the case:

"[T]his has been an ongoing case of narcotics dealing since January of 2001, it's undisputed in the report. There were 200 ecstasy pills purchased by - from the defendant by the confidential informant between January of 2001 and December of 2008. There was a purchase of 15 pills in December of 2008. The criminal history is nonexistent, which is a very good thing for Mr. Lee. And he has been the owner of this restaurant in Bartlett, Mandarin Palace, since 1991 and appears to

> have some talent in that area and is, by all accounts, in that area performing very well. So those factors do weigh in favor of Mr. Lee."(emphasis added)(DE:25 at pgs# 15; Appdx:67a)

With respect to LEE's comments to the Court, he stated only:

> "I made a big mistake in my life, and, please, I need a second chance so I can continue with my restaurant which I love to do. Thank you."(DE:25 at pgs# 14; Appdx:66a) Upon hearing the parties, the Court then stated:
>
> "I believe that to give a probationary sentence under the circumstances of this case would send a wrong message. But I don't believe 24 months is necessary to get this defendant's attention and punish. So the court is going to impose a custody sentence of 12 months and a day. The court is going to impose a period of three years supervision. And the court will impose a fine in this case of $5,000, along with a one hundred dollar special assessment. That is going to be the court's sentence. Now this 12 months plus one day sentence will allow you to serve a minimum amount of time and you should be able to keep your restaurant going. Given this defendant's record, the court will recommend he be allowed to serve his time at the Millington camp. And the defendant will be allowed to self report." (emphasis added) (DE:25 at pgs# 16-19; Appdx: 68a-81a)

Relevantly, at no time during the sentencing hearing was there any discussion about any

deportation of LEE. Indeed, to the contrary, the record shows everyone was operating under the assumption LEE would not be deported. That is, the prosecutor, Fitzgerald, LEE himself, and even the Court all focused their considerations on LEE's restaurant businesses and an objective of fashioning a sentencing which would allow him to keep operating them after his release. (DE:25 at pgs# 10-19; Appdx: 62a-81a) Furthermore, the actual Judgment & Committal Order (J&C) did not include any of the standard conditions or language included when deportable aliens are sentenced. (DE:27; 30)[13] [14]

LEE's Post-Sentencing Realization Of His Being Deportable

After sentencing, an Order directing LEE to self-surrender by February 1, 2010 was issued. (DE:31) In the intervening five (5) months between LEE's sentencing and self-reporting date, however, the BOP elected to *not* follow the Court's recommendation to designate LEE FPC Millington (which was only fifteen (15) minutes away from his home), but to instead designate LEE to "CCA-Adams," in Mississippi. (DE:34-35) Moreover, although he would not realize it until much later, the reason the BOP had not followed the recommendation to designate

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[13] A J&C for a deportable alien will include conditions that a defendant is to be turned over to INS for deportation at the conclusion of his sentence, or that any supervised released is non-reporting while the he/she remains outside the United States. LEE's J&C, however, did not.

[14] The reason two (2) J&Cs appear is because the one entered at sentencing (DE:27) was later amended (DE:30) to correct a clerical error which had used the date January "2009," when it was supposed to be "2010."

LEE to FPC Millington was because the BOP had classified LEE as a deportable alien which, in turn, precluded camp placement, half-way house, drug-programs, etc.

As a result of the unexpected designation to CCA-Adams, Mississippi, Fitzgerald filed a motion (DE:36) to extend the self-reporting date from February 1, 2010, to April 1, 2010, which the Court granted on January 29, 2010. (DE:37) However, LEE decided to self-report as originally ordered on February 1, 2010, anyway. (DE:38) Relevantly, LEE made this decision because he had already made arrangements for a close friend to help manage his restaurant businesses for the six (6) to ten (10) months "maximum" he expected to be away from them. (See Declaration of LEE, Appdx:88a-93a) Moreover, this friend, as well as other witnesses, can attest that at this time LEE was still operating under the full expectation that he was in no danger of deportation and that he would soon be back to running his restaurants. (Id.)

Upon LEE's surrendering himself to the U.S. Marshalls in Tennessee on February 1, 2010, it took another six (6) weeks for him to get transported and actually arrive at CCA-Adams in Mississippi. Upon his arrival, LEE soon learned that the facility was a not just a prison recently opened by Corrections Corporation of America (CCA) on contract for the BOP, but that it was a special institution which *exclusively* housed federal inmates which were to be deported upon completion of their sentences. (See Declaration of LEE, Appdx:88a-93a)

Shortly thereafter, through prison staff assigned to his "case management," LEE discovered that he was a deportable alien based upon his conviction and

that INS would soon visit with him to initiate deportation proceedings. (Id.) Consequently, LEE immediately contacted Fitzgerald about his predicament. (Id.; see Telephone Records, Appdx:74a-85a) Fitzgerald, however, maintained that LEE must be "mistaken," and that he was "not going to be deported." (Id.) LEE thus re-confirmed with prison staff that it was Fitzgerald who was mistaken because there was no question INS was seeking his deportation.(Id.)

Facing this crisis, LEE then inquired of inmates in the law library about what his "options" were to prevent being deported. (Id.) In this regard, LEE was advised he needed to get a letter from his lawyer confirming the Government had agreed not to deport him, as well as that such was the advice Fitzgerald had given. LEE was likewise advised that he also needed to request Fitzgerald send him a copy of his docket from P.A.C.E.R.; plea agreement; J&C; PSI; discovery; plea change and sentencing transcripts. (Id.)

Accordingly, LEE immediately telephoned Fitzgerald and requested the letter as well as all of the previously noted materials. (Id.) Although this preliminary call and request for information occurred on April 7, 2010 (Appdx:85a), as well as that Fitzgerald assured LEE he would provide all of the requested materials (including the letter confirming to INS that he was not supposed to be deported), nothing ever actually came from Fitzgerald despite more than two (2) dozen documented phone calls by LEE which resulted only in Fitzgerald repeatedly *misrepresenting* the materials were "on the way in the mail." (Id.)

Indeed after more than a month of receiving nothing but unfulfilled assurances, it was only upon threat of a Bar Complaint and notice of intention to request this Court subpoena the prison's recorded phone calls that Fitzgerald finally provided the letter for INS, as well as a few (but not all) of the requested materials. (Id.) With respect to the letter for INS confirming LEE was not supposed to be deported, however, Fitzgerald determinatively wrote:

> "To Whom It May Concern:
>
> There was never any discussion of deportation during the negotiation of the Plea Agreement or during Sentencing. It was my understanding that the Government was not seeking Deportation of Mr. Jae Lee. Please feel free to contact me at my office if needed for further discussion concerning this matter." (emphasis added) (See Appdx:86a-87a, Letter of Fitzgerald to LEE for INS, date May 10, 2010)

Upon receiving the aforesaid letter, LEE still had to further contact Fitzgerald another more than thirty (30) phone calls to request he send the remaining materials which had been requested. (Declaration of LEE, Appdx:88a-93a; see also Telephone Records, Appdx:74a-85a) These included copies of the P.A.C.E.R. Docket, as well as the transcripts of both the plea change and sentencing hearings. (Id.) Again LEE was met with one repeated unfulfilled assurance after another, but no actual materials arriving. (Id.) Accordingly, LEE had an inmate assist him in writing Fitzgerald a stern letter, including a threat of a Bar Complaint, if he did not provide the requested materials; however, LEE still did not receive the materials until his friend (managing LEE's

restaurant) went down to the Memphis District Courthouse and paid for the transcripts himself. (Id.) As a result, LEE was not in possession of all record materials he needed for this §2255 until early-August of 2010. (Id.)

Upon receiving all of the materials and seeking assistance from inmates in the prison law library, LEE was shown case law (such as the Supreme Court's recent Padilla holdings), as well as statues which revealed that Fitzgerald had *affirmatively misadvised* him that he would not be deported despite relevant immigration statutes were succinct and straightforward that the count LEE pleaded guilty to made his deportation a virtual certainty. (Id). Consequently, this §2255 now timely follows.

ARGUMENT

LEE asserts that his sentence was rendered in violation of the Sixth Amendment's guarantee of effective assistance of counsel throughout all critical stages, including pretrial investigation, plea change proceedings, and at sentencing. In this regard, LEE asserts that his attorney, Larry Fitzgerald, esq., independently, as well as cumulatively, rendered ineffective assistance by:

> (1) not only failing to inform LEE that a collateral consequence of his pleading guilty would subject him to deportation, but actually *affirmatively misadvising* him that he would not be deported if he pleaded guilty;
>
> (2) failing to conduct any pretrial investigation into possible defenses, evidence, witnesses, discovery or search warrant deficiencies, potential lesser offense options, and/or ensuring LEE received proper consideration for the

undisclosed benefits the Government received as a result of his plea; and

(3) confusing the Court at sentencing by misrepresenting LEE was a "citizen of the United States," when he was not, and thus, depriving the Court of the knowledge and consideration of a factor (the consequence of deportation) which is commonly relied upon as part of a Court's sentencing discretion.

The Sixth Amendment Law

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence," U.S. Const. Amend. VI, and that such assistance be effective, see Strickland v. Washington, 466 U.S. 668, 686 (1984). To establish a claim for ineffective assistance, LEE must demonstrate "counsel's performance was deficient" and that it "prejudiced the defense." Id. At 687-88. That is, it "must be shown that counsel's representation fell below an objective standard of reasonableness" measured by "prevailing professional norms." Id. Additionally, the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all circumstances. Kimmelman v. Morrison, 477 U.S. 365 (1986). Moreover, because counsel's conduct is presumed to be reasonable, LEE must establish no competent counsel would have taken the action in question. Id.

As to Strickland's second prong - prejudice - LEE must show that there is a reasonable probability the proceedings would have been different absent counsel's unprofessional errors. Id. at 694. A "reasonable probability" is one that is sufficient to undermine

confidence in the outcome. Id. As relevant here, the two-part Strickland v. Washington test applies to challenges to guilty pleas because they operate as a waiver of important constitutional rights, and thus, must be an informed choice among the alternative courses of action open to the defendant. See Hill v. Lockhart, 474 U.S. 52 (1985); see also, Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005). As such, a guilty plea must be voluntarily, knowingly, and intelligently, with sufficient awareness of relevant circumstances and likely consequences. Id.; see also Boykin v. Alabama, 395 U.S. 238, 243 (1969); North Carolina v. Alford, 400 U.S. 25, 31 (1970).

Likewise, it is thus also LEE's burden to establish (absent a plea agreement with different conditions) there was "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, supra. Moreover, this is again an "objective" inquiry, which is dependent on the likely outcome of a trial had the defendant not pleaded. Id.; see also Railey v. Webb, 540 F.3d 393 (6th Cir.2008). In this manner, it is important to distinguish that to establish prejudice under Hill, LEE need *not* show with absolute certainty that a jury would have acquitted him, but demonstrate only there was a reasonable potential for a favorable outcome had he rejected the guilty plea. See Dando v. Yukins, 461 F.3d 791 (6th Cir. 2006).

Separate and apart from the foregoing, the Sixth Amendment also requires counsel to conduct adequate investigations relevant to the advice that attorney renders to his client. Strickland, supra, 466 U.S. at 690-91; see also Wiggins v. Smith, 539 U.S. 510 (2003). In this regard, while strategic choices

made after thorough investigation of law and facts relevant to all plausible options are virtually unchallengeable, strategic choices made after *less than complete investigation* are reasonable only to the extent reasonable professional judgments supports counsel's decision not to investigate. Wiggins, 539 U.S. At 521-22.

In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Id.; see also Carter v. Bell, 218 F.3d 581, 595-96 (6th Cir.2000)(same); Dando, supra (where a failure to investigate does not reflect sound professional judgment, deference is not appropriate); Hawkins v. Coyle, 547 F.3d 540 (6th Cir.2008) (same). Furthermore, the investigation should always include efforts to secure information in possession of the prosecution and law enforcement authorities. (Id.)

Additionally, counsel retains a duty to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty regardless of the accused's admissions or statements to the lawyer of facts constituting guilt, or even the accused's stated desire to plead guilty. See American Bar Association, Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.); Rompilla v. Beard, 545 U.S. 374, 387,(2005)(quoting ABA Standards and holding defendant's admission of guilt to his lawyer does *not* absolve the lawyer of his duty to investigate the crime and issues relevant to potential penalties).

Lastly, with respect to sentencing, to establish ineffective assistance a defendant need *not* show "that counsel's deficient conduct *more likely than not* altered the outcome" of his sentencing proceeding,

but he must only establish "a probability sufficient to undermine confidence in that outcome." See Porter v. McCollum, 130 S.Ct. 447, 453 (2009)(quoting Strickland, 466 U.S. at 693-94).

The Effect of Padilla v. Kentucky

Prior to the Supreme Court's relatively recent ruling in Padilla, the law of this Circuit held that deportation was a collateral consequence, and thus, by implication rendered a defendant unable to claim that counsel's failure to advise him of likely deportation was ineffective and/or rendered a guilty plea unknowing and involuntary. See El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir.2002)(holding deportation is not within the control and responsibility of the district court, and hence, is collateral to a conviction).

The Supreme Court in Padilla, however, abrogated *El Nobani*, and instead directed that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel [and] when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." Padilla v. Kentucky, WL 1222274 (2010). Notwithstanding the foregoing change in law, however, what has always been the case in this Circuit is that an attorney's "affirmative misadvice" about a serious issue deprives a defendant of effective assistance of counsel. See Sparks v. Sowders, 852 F.2d 882 (6th Cir.1988) (holding that gross misadvice concerning parole eligibility constitutes ineffective assistance). Moreover, the misunderstanding of deportation consequences was important. See INS v. St. Cyr, 533 U.S. 289, 323 (2001)(recognizing that preserving client's right to

remain in the United States may be more important than any potential jail sentence").

The Law Applied To Attorney Fitzgerald's Performance

From the outset, LEE acknowledges that there is no dispute the Court at the plea change hearing did advise LEE that there was a possibility of deportation. (See pg# 17-18, supra; see also DE:20 at pg# 9-10; Appdx:38a-39a) However, the law requires this Court to base its assessment on an examination of not just that incident in isolation, but the entire record, evidence, and circumstances as a whole. See Hodge v. Haeberlin, 579 F.3d 627 (6th Cir.2009).

Under such a holistic view, the record shows that preceding the deportation warning, the Court had also cautioned LEE about many other (non-deportation) consequences, to which LEE advised he understood and accepted those consequences *without hesitation*. (See pgs# 17-18, supra; also DE:20 at pgs# 8-10; Appdx:37a-39a) Yet, when the deportation caution was given and the Court asked "Does that at all affect your decision about whether you want to plead guilty or not?", LEE in this instance clearly hesitated and stated: "Yes, Your Honor." (Id.) Moreover, when the Court thus further inquired: "Okay. How does it affect your decision?", LEE advised: "I don't understand." (Id.) Relevantly, it was only after Fitzgerald's brief consultation in LEE's ear advising the "standard caution" was moot because he would absolutely *not* be deported, did LEE agree he "still want[ed] to go forward guilty?" (Id.)

As the Government itself will most likely point out in its ultimate response to the instant §2255 Motion, LEE's claims that Fitzgerald assured him

both before, during, and after the plea change hearing that he would not be deported do not *expressly* appear on the record, but are "he said-he said" allegations recounted only in LEE's Declaration (See Appdx: 84a-88a) Nevertheless, while LEE concedes that his arguments might have had some trouble if the record in this case consisted solely of the deportation caution at the plea change hearing and LEE's post-sentencing Declaration, the Government will also have to concede that the evidence at hand constitutes much more than just the foregoing. For instance, the record shows at sentencing the prosecutor did not appear to believe LEE risked deportation because he agreed that a "factor" weighing "in favor" of LEE was that he was "the owner of this restaurant. . . and appears to have talent in that area and is, by all accounts, in that area performing very well." (See pg# 28, supra; DE:25 at pg# 15; Appdx:67a)

Furthermore, demonstrating that LEE himself clearly didn't realize he risked deportation is that his sentencing allocution was focused solely on being able to operate his business: "I need a second chance so I can continue with my restaurant which I love to do. Thank you." (See pg# 28, supra; DE:25 at pg# 14; Appdx:66a) Moreover, the sentencing record shows that even the Court didn't believe LEE risked deportation, as evidence by its reasoning that issuance of a below-guideline sentence of one year and one day was because it would "allow you to serve a minimum amount of time and you should be able to keep your

restaurant going." (See pg# 28-29, supra; DE:25 at pg# 16-19; Appdx:68a-81a)[15]

Of course, nothing can be more affirming of LEE's claims Fitzgerald gave him misadvice about the risk of deportation than Fitzgerald's own post-sentencing letter to LEE to provide INS which stated: "There was never any discussion of deportation during the negotiation of the Plea Agreement or during Sentencing. It was my understanding that the Government was not seeking Deportation of Mr. Jae Lee." (See pg# 33, supra; Appdx:86a-87a)

Accordingly, LEE respectfully submits that analyzing "the record, evidence, and circumstances as a whole" demonstrate LEE has more than satisfied his burden of establishing that Fitzgerald not only failed to inform LEE that the virtually automatic collateral consequences of his guilty plea was that he would be deported, but that Fitzgerald actually affirmatively misadvised LEE he would not be deported if he chose to plead rather than proceed to trial. Put plainly, even before Padilla, this Circuit's law would have nevertheless held Fitzgerald ineffective under Strickland's first prong. Sparks, supra, 852 F.2d 882.

As discussed supra, as to Strickland's second prong - prejudice - LEE must show that: (1) he would have proceeded to trial had it not been for Fitzgerald incorrectly advising him that he would not be

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[15] Also indicative that the Court didn't realize LEE would be deported was that it also recommended LEE be able to serve his sentence at Federal Prison Camp Millington (which deportable aliens cannot be designated); be allowed to self-report (which is also rare for deportables); and issued a J&C which did not include any of the language typically included when sentencing a deportable defendant. (Id.)

deported; and (2) that a decision to reject the plea bargain would have been rational under the circumstances (i.e. a showing that LEE possessed a reasonable possibility of a successful outcome at a trial). See Hill, supra, 474 U.S. at 59; see also Railey v. Webb, 540 F.3d 393 (6th Cir.2008); Roe v. Flores-Ortega, 528 U.S. 470, 480-486 (2000). As discussed supra, this Court's assessment requires an objective inquiry into the circumstances of the crime, available defenses, amount of evidence, etc. Id.; see also Dando, supra.

For certain, LEE's defense would have had to be sufficient to challenge the Government's case had he gone to trial. As such, it is relevant to look at exactly what the Government stated that case was or, more importantly, what is was not. From a purely legal perspective, an objective inquiry into the circumstances, defenses, evidence, etc., should thus be constrained to the evidence that the Government disclosed in their Rule 16 Discovery Letter, DEA Reports, and upon proffer to the Court at the plea change hearing. That case and evidence being: the Ecstasy pills retrieved as a result of the warrant; LEE and CHU's oral statements to agents; and the Government's proffered intention to use expert testimony eighty-eight (88) pills was an amount more consistent with a trafficker than personal use. (See pgs# 9-12, 19, supra) Elsewise, LEE respectfully submits allowing the Government to now add things to an objective inquiry which they did not disclose at the proper time previously would render superfluous the intended protections of F.R.C.P Rule 16, law-of-the case doctrine, etc.

Under such a view, this case is seen as a very minor compared to typical Ecstasy-based prosecu-

tions with a distribution or trafficking nexus. That is, the actual "offense of conviction" involved only eighty-eight (88) pills at *most*. (DE:2; DE:16; pgs# 9-12, 18, 28, supra) Relevantly, Lee was not charged with simple possession of MDMA, but was charged and pleaded guilty to "Possession With Intent To *Distribute* MDMA." The distinction is critical since the Government would have had to prove a distribution/trafficking link. See United States v. Toler, 144 F.3d 1423(11th Cir.1998)(government must prove what it *charged in the indictment*)(collecting cases).

Of course, the small amount involved would be only one consideration of a jury in considering whether LEE was guilty of "Possession With Intent To Distribute MDMA." However, when reviewing all of the other purported evidence claimed by the Government, it actually favors LEE's simple possession claim. For example, although the Government claimed in discovery that they intended to use the statements of LEE given to agents at the time of the search warrant execution, they do not say that LEE admitted to being a trafficker, but instead that LEE steadfastly maintained he "did not sell the Ecstasy to anybody, [but] would give it away when he would go out to party with friends." (Supra at pgs# 9-12, 18, 28; see also DE:16; Appdx:3a, 12a)

Indeed, the only other witness statement appearing in discovery was that of Amy Chu, LEE's live-in girlfriend of twelve (12) years, who also advised agents at the scene of the search warrant execution that "she never purchased narcotics [but that] LEE would give it to her when they were partying [and] that she had no knowledge of LEE's narcotic trafficking." (Id.) Moreover, when looking through all of

the Government's actual discovery disclosure and evidence proffer at the plea change hearing, the only thing that the Government claimed they would use to establish the distribution element of their prosecution was their stated intention to use experts to testify that "the amount of MDMA recovered [88 pills] was consistent with distribution rather than personal use." (See pg# 18, supra; see also DE:20 at pg# 16-17; Appdx:45a-46a)

While the Government would have been entitled to present experts, LEE submits it isn't anything if not fair to say that just as many experts would testify that eighty-eight (88) Ecstasy pills was a relatively small amount which, at the very least, would have required examining additional factors to determine an inference of trafficking as opposed to personal use. In this vein, LEE submits that the statements of he and his girlfriend claiming personal use only, lack of any prior criminal history, and absence of any other disclosed witnesses to say otherwise, all would have been major factors in dispelling the Government's burden of proving beyond a reasonable doubt that LEE committed a distribution-based offense.[16]

For clarity, while LEE does not suggest that a jury could not have chose to find him guilty by

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[16] Additionally, it would not be unreasonable to say that possessing eighty-eight (88) pills was more consistent with personal use than with distribution in the context of this case (i.e. it involved a person who frequently partied with several friends and gave away multiple pills at a time, and who had the financial means to buy one-hundred (100) pills at a time to significantly reduce his per pill cost). After all, LEE did own two (2) restaurants and had $32,000 in his bank deposit bag.

accepting the expert testimony, he does respectfully submits that it is quite objective to state it would at least have been just as likely for the jury to have rejected the experts, accepted his defense theory, and acquitted him of the count as charged. Pertinently, to establish prejudice, LEE need *not* show with absolute certainty that a jury would have acquitted him, but demonstrate only that there was a reasonable potential for a favorable outcome. Dando, supra.

Notwithstanding the foregoing, LEE recognizes his primary argument discussed above is predicated upon the presumption the Government would not have been permitted to used the *undisclosed* CI-nexus to prosecute him. In this regard, while LEE stands by the assertion that such a claim is proper in light of the law and federal rules, his full arguments nevertheless go beyond just that reliance. Rather, even gratuitously assuming, in arguendo, that the Government could have somehow managed to get the undisclosed CI-nexus into a prosecution of LEE, then it is only fair that the assessment of what would have likely happened at a trial needs to include examination of both sides of the story.

Under such a full context view, the best the Government's case gets is still only a three-hundred and three (303) Ecstasy pill prosecution which would have required going back more than eight (8) years of transactions to aggregate no less. Again, looking at the numbers alone, it is very reasonable for LEE to suggest it was a plausible argument to any jury that the amounts and time spans involved were more attributable to simple possession rather than the hallmarks of a trafficker. While the testimony of the CI claiming he purchased slightly over two-hundred (200) pills from LEE, especially in combination with

the allegation the CI facilitated a fifteen (15) pill "controlled buy" would have no doubt been factors weighed by any jury, the CI would have been subjected to cross-examination and impeachment.

That is, any testimony of the CI about his alleged purchases from LEE would have thus been met with the inescapable fact that the math of two-hundred (200) pills across forty (40) transactions (and eight years) worked out to the CI having only obtained an average of five (5) pills per transaction (i.e. a few times a year). Accordingly, while the jury could have believed the CI's claim such constituted drug trafficking events, the amounts involved could also have been construed as consistent with LEE's defense he never sold any pills, but would only use them personally and give them away when partying. Furthermore, in addition to the testimony of his girlfriend, he would have been able to produce several other witnesses (his friends) who would have testified LEE never sold drugs, but only gave the Ecstasy away while partying, as well as confirmed the CI was a "mooch" and "free-rider." (See Declaration of LEE, Appdx:88a-93a)

In sum, this trafficking-based prosecution would have really boiled down to the jury's credibility assessment of the CI and, as far as credibility goes, even if the Government could have managed to navigate Rule 16 and get the undisclosed CI-nexus into its prosecution, what we do know is use of the CI would have triggered the obligation to disclose all that was related to him. Among other things, this would have included all the DEA Reports of what the CI had claimed, as well as what the "audio recordings" said.

As discussed supra, with respect to the CI's claim he owed LEE $150 for an existing drug debt, the CI had reported to agents he went to LEE's house and paid the debt, as well as that he allegedly observed LEE packaging fifteen (15) Ecstasy pills on that occasion. (Pgs# 20-23, supra; PSI:4) Conversely, LEE's position would have been that the CI lied about having paid the debt at that time; that the CI never saw him packaging any narcotics because LEE told the CI he was trying to quit taking Ecstasy due to the expense and thus did not have any pills; and that LEE rejected the CI's request to do him the "favor" of getting him some pills to party with a new girlfriend. (Pgs# 2427, supra; Appdx:88a-93a)

Relevantly, the vast difference between the version of events as told by the CI and LEE would not have come down to just a credibility contest between the two. Specifically, although it is unknown if there was an "audio recording" of the CI's first visit to LEE's house (purportedly to pay the debt), if there was, then the CI would have been completely exposed as a liar. Of course, the reason we do not know how many audio recordings there might have been was because the Government never disclosed the CI-nexus in their Rule 16 Letter or evidence proffer at the plea change hearing. Indeed, even when the CI-nexus "appeared" in the PSI, it only referenced one (1) audio recording (of the controlled-buy), but without revealing what that recording actually said.

Nevertheless, even without any audio evidence, the CI's story would have been exposed through LEE and (his companion accompanying him) testifying that he picked up from the CI's mailbox the same $150 more than a week after the CI had untruthfully reported to agents he had purportedly already paid

it. Moreover, as discussed supra, what we do know is that the alleged controlled buy of fifteen (15) pills was at least purportedly conducted with the CI having been outfitted with an audio recording device. Accordingly, the inconsistencies of the CI's claims about the drug debt, packaging of pills, etc., would have nevertheless been revealed as untruthful here because LEE again discussed having retrieved the $150 debt from the CI's mailbox on this occasion as well.

Thus, as LEE would have argued it to the jury, after LEE telling the CI he had no Ecstasy because he was quitting, the CI decided to tell the agents he paid the debt, but instead actually pocketing the $150 in Government funds for himself. To make his handlers happy, however, he told them the lie that he observed LEE packaging fifteen (15) Ecstasy pills. Unfortunately, the CI's lies to agents only got him into more trouble because they now wanted the CI to conduct a controlled buy for pills which the CI knew LEE didn't actually have.

Facing this dilemma, the CI then began his spree of more than three (3) dozen calls over a one (1) week period (provable through cell phone billing records), wherein he pleaded with LEE to do him a "favor" of getting him some pills to party with a new girlfriend. Although, LEE rejected these pleas at first, after being "stalked" by the CI, LEE ultimately agreed to the "favor" just to get the CI to stop calling him. Now, however, the CI knew he needed to cover the $150 for the drug debt for the unpaid "split" on the ounce of marijuana, as well as come up with the $300 to cover the cost of LEE's doing the favor of picking up the pills. Unfortunately, this created another problem for the CI because the fifteen (15) pill pick-up would be a controlled buy watched by agents, and

probably with the CI "wired." As such, the CI could not just walk in with $450 on the buy date because that would have caused the agents to realize he had lied to them about paying the $150 previously.

Accordingly, as the jury would have been offered, this was why the CI had to tell LEE to come to his (CI's) house and pick-up the money from his mailbox, as well as why in order to induce LEE into doing him the "favor" of getting the pills (which the CI knew LEE would otherwise not do), the CI had to tell LEE he would have the whole $450 for him (the $150 debt plus the $300 to cover the pills so as not to be a mooch). (Pgs# 24-27, supra; Appdx:88a-93a[17]

Further problematic, however, was that the CI could not provide the $450 as promised to LEE, but needed to hold back $300 to conduct the controlled buy. In turn, this is why when LEE (and his companion) arrived at the CI's house and retrieved the envelope from the mailbox, it only contained the $150 and a note stating that "this is all I have right

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[17] The CI knew LEE would not be willing to do him the favor of getting some Ecstasy pills because LEE had told him he was trying to quit. In this same vein, the CI also knew that he would not only need to cover the $150 for the unpaid split on the marijuana ounce, but that he would have to cover the $300 for the pills he wanted LEE to get him as a "favor" (i.e. cover the costs, but without remuneration to LEE). That is, unlike what had occurred in the past when LEE was a frequent user, LEE would be unwilling to provide the pills gratis (i.e. at LEE's personal expense), because he himself was trying to stop using pills and had complained that part of his reasoning was the expense of the habit and the downturn in income from his restaurant businesses. In sum, as relevant to entrapment defense discussed infra, the CI had to induce LEE into doing what he was not predisposed to doing otherwise.

now." (Id.) Of course, where the CI's problems got worse is when he conducted the controlled buy while wearing a recording device. (Pgs# 21-22, supra; PSI:4) That is, LEE berated the CI for the mailbox issues (i.e. telling him that $450 was there when only the $150 was). (Pgs# 24-27, supra; Appdx:88a-93a) As such, among other exculpatory comments (infra), *that* audio recording would have also exposed the CI had lied to agents about previously paying the $150 debt (and thus by reasonable inference about seeing any pills at that time either), as well as that the CI had engaged in the mailbox endeavor in an effort to cover up his past deception with law enforcement.

In addition to all of the foregoing, further detracting from the ability of the Government to rely on the CI to prove a *distribution/trafficking-based* case, as well as bolstering LEE's version of events, we must remember that the PSI reported the first visit by the CI to LEE's residence where he purportedly observed LEE packaging fifteen (15) Ecstasy pills, occurred on December 2, 2008. (Pg# 2, supra; PSI:4) Yet, the PSI reports that the later alleged controlled buy of fifteen (15) Ecstasy pills did not occur until nine (9) days later, on December 12, 2008. (Id.)

Based on just the foregoing alone, LEE submits it is very objectively reasonable for him to assert that a jury could have been persuaded it was questionable that, according to the CI, LEE was supposedly a drug-trafficker (who had been observed packaging fifteen (15) pills no less), but that it took another more than nine (9) days to fill that same, small fifteen (15) pill order. Such is consistent with LEE's version of events (and entrapment defense) that he did not have any pills when the CI visited the first instance. (See pg# 24-27, supra; Appdx:88a-93a)

Moreover, agents did not obtain and execute their search warrant until another four (4) weeks later, on January 7, 2009. (Pgs# 9-10, supra; DE:16; Appdx:9a-16a) Pertinently, during that *entire month interim*, the CI did not try to conduct any further controlled buys with LEE. More importantly, the amount of Ecstasy recovered by the search warrant showed not only that LEE never sold any of the one-hundred pills he had got from his source, but that consistent with his claims of trying to quit, he hadn't even used any personally. (Id.; see also, supra at pgs# 9, n.4; 19, n.5; & 27, n.12)

Most respectfully, this is just yet another example of where it is reasonable to suggest that a jury very probably could have accepted LEE's defense he was not a drug-dealer, but only bought pills for his and his friend's *personal* use when partying, as well as that after initially and repeatedly refusing, LEE was only induced by the CI into doing him a "favor" of getting some pills (without remuneration) because of his three (3) dozen calls later that week and the CI's plea for LEE's help so he could party with a new girlfriend. (See pg# 24-27, supra; Appdx:88a-93a)

Indeed, as discussed supra, use of the CI at any trial would have required disclosure of phone records and what the audio recordings contained. At a minimum, the phone records, would have confirmed the more than three (3) dozen phone calls by the CI to LEE within the one-week period after the CI's initial visit to LEE's residence. Furthermore, audio recordings would have showed that when the CI came to pick up the pills, LEE berated the CI for having "stalked" him and the "B.S." about the mailbox incident. (Id.) In fact, the same recording would have showed LEE's *reiteration* to the CI that it was only

because of his persistence that he had got the pills, as well as that he was really trying to "cut-back" on the "expensive habit" of taking Ecstasy, and that this had been the "first time in a very long time" that LEE had even gone to his source for pills. (Id.)

As such, not only could have LEE very reasonably and objectively argued to the jury that his conduct in relation to the CI and controlled buy was consistent with LEE's personal use/simple possession defense, as opposed to the distribution/trafficking-based count he was actually charged with (i.e. drug dealers typically do not need to be stalked by their customers to buy narcotics; drug dealers would not go an entire month without making a sale; etc.), but this same evidence would have also engendered LEE with the availability of a strong entrapment defense that LEE was not predisposed to drug trafficking, but was a personal user who possessed Ecstasy for himself and/or gave it away to friends when partying. As this Court is aware, entrapment is an absolute defense. See United States v. Nelson, 922 F.2d 311 (6th Cir.1990).

Plainly put, in respect to the entire CI-nexus as whole, if the Government were to say here in these §2255 proceedings that the undisclosed CI-nexus was somehow powerful enough to have secured a conviction if LEE had gone to trial, then it begs the question as why they did not display such confidence during the pretrial proceedings. That is, if the CI-related issues actually strengthened their case, then it is hard to imagine any prosecutor who would not have wanted to flaunt these strengths in discovery and in an evidence proffer. LEE respectfully submits the fact the Government uncharacteristically did not do so cannot be ignored.

In fact, LEE further submits that the Government's non-disclosure of anything related to the CI (including not even being confident enough to provide a copy of the search warrant or supporting affidavit), is indicative that said decision was not a mere oversight, but one of necessity due to Government's realization of the problems attendant to the CI and his credibility Government realized. Indeed, the Government likely had no choice but to bypass the CI-nexus because to do so would have been to countenance the suborning of perjury which, as we know, the Government may not do. See Nix v. Whiteside, 475 U.S. 157 (1986).

Under any circumstances, LEE submits that in making an objective inquiry into whether he had a reasonable possibility of a favorable outcome at trial, it should be remembered that a standard "reasonable doubt" instruction advises the jury that doubt "proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs." See White v. Mitchell, 431 F.3d 517 (6th Cir.2005). Most respectfully, LEE submits that under the circumstances and evidence in this case, it is reasonably objective for him to say a jury would have been unwilling to act on anything the CI said in even the unimportant of their affairs.

Additionally, it is relevant to note that after his sentencing and arrival in prison, LEE has communicated with friends which were those that would "party" with him, but were never charged by the Government. According to them, information has been circulating that use of the CI had become so problematic and undesirable for the Government that LEE's arrest was done so prosecutors could

essentially use LEE as a surrogate to the CI for purposes of assisting their efforts in other cases. (See Appdx:88a-93a) Specifically, LEE has been advised that the "word on the street" is that the CI had proved so unreliable, untruthful, and scandalous, that the Government risked damage to the prosecutions of numerous high-level drug traffickers they were trying to build a case upon. (Id.) Relevantly, one of these traffickers was LEE's source (Gum Lum) for buying pills, and with whom use of the CI for any prosecution had become a "problem." (Id.)

Although LEE concedes he has injected part speculation, it is not without some firmer basis that he can confidently say that he has reason to strongly believe his arrest was to help prosecutors with their significant Gum Lum case (as well as others). That is, LEE has been advised prosecutors were able to negotiate a plea agreement with Gum Lum through *representing* to he and his attorneys that LEE was pleading guilty and would be testifying against Gum Lum. (Id.) In turn, Gum Lum's plea led to prosecutors ability to pressure and negotiate several other pleas, cooperation, and/or prosecutions with numerous even higher-level traffickers. (Id.)

Even though LEE's current information does not come from an "official source," it would not be difficult to determine its validity. Pertinently, if true, LEE was unaware of any of this, and thus, Fitzgerald would have rendered ineffective assistance because his failing to investigate LEE's case which, in turn, would have included talking to the attorney's in related cases. Thus, the lack of investigation caused Fitzgerald not to ensure that LEE receive consideration for the benefits the Govern-

ment received through LEE pleading guilty. See Dando, supra.

Moving on, and notwithstanding any of the issues discussed thus far, another "option" that was available to LEE was the ability to challenge the underlying search warrant based on 4th Amendment grounds. As discussed supra, at no time in this case, discovery or otherwise, did the Government provide a copy of the search warrant or its supporting affidavit. In fact, nowhere did the Government even disclose the underlying justification as to why and how the search warrant was obtained. Rather, it was only through the PSI that we are left to *presume* that the search warrant was perhaps based solely upon the undisclosed CI-nexus. (PSI:4-5)

Although LEE takes the position he was entitled to the search warrant and any supporting affidavits *before* he pleaded guilty, regardless of whether or not the Government wanted to include the CI into its case, there at least can be no question that the warrant, etc., would have been required disclosure if the Government had stated any intention to use the CI-nexus. In any event, the search warrant affidavit was ostensibly based on the same claims from the CI that later appeared as part of the PSI. Accordingly, just as LEE has demonstrated herein that the CI claims have been shown to have constituted material untruths and omissions of relevant information, so to would have been the ability for LEE to challenge the validity of the search warrant's predicate. As this Court also knows, every possible charge imaginable in this case would have required dismissal if the validity of the search warrant could not be sustained.

Importantly, the fact that Fitzgerald did not even request to see the search warrant, let alone consider

challenging it despite LEE's advising him of all the inconsistencies relevant to the CI (see pgs# 24-27, supra; Appdx:88a-93a), also demonstrates an independent ground in support of LEE's overall Sixth Amendment claims. Specifically, as a threshold consideration, the failure to request a copy of the search warrant or even at least investigate possibly challenging it does *not* constitute *sound* professional judgment under the law. Hawkins v. Coyle, supra, 547 F.3d 540 (investigation should always include efforts by counsel to secure information in possession of prosecution and law enforcement).

Furthermore, Fitzgerald cannot claim that his decision to forgo any review or consideration of the search warrant was based upon his belief such was unnecessary in light of LEE's decision to plead guilty. See Rompilla v. Beard, supra, 545 U.S. at 387, (2005)(quoting ABA Standards and holding defendant's decision to plea, or even his admission of guilt, does *not* absolve the lawyer of his duty to investigate the crime and issues relevant to penalties the client will face).

CONCLUSION

LEE respectfully submits that he has met his burden of establishing that, absent a plea agreement with different conditions or charges, there was "a reasonable probability that, but for [Fitzgerald's] errors [of affirmatively misadvising him that he would not be deported if he pleaded guilty], he would have insisted on going to trial." Hill, supra, 474 U.S. At 52.

LEE further submits that an "objective" inquiry into whether he had a reasonable potential for a favorable outcome at trial had he rejected the plea

has also been firmly established. Id.; see also Railey v. Webb, supra, 540 F.3d at 393; Dando, supra 461 F.3d at 791. Specifically, an "objective inquiry" in this case reveals:

> (1) a complete lack of trafficking or distribution evidence to support the count LEE was indicted upon and pleaded guilty to;
>
> (2) the existence of extensive exculpatory evidence and witnesses to support LEE's defenses;
>
> (3) that even if the Government could have used the CI-nexus at any trial (despite never disclosing it during discovery or the evidence proffer at the plea change hearing), there would have nonetheless been severe credibility problems and provable inconsistencies which would have clearly weighed favorably against any jury finding LEE guilty beyond a reasonable doubt of the offense he was charged with;
>
> (4) an independent ability to challenge and suppress the search warrant, which would have resulted in dismissal of *any* charges; and
>
> (5) the otherwise availability of a strong entrapment defense.

Independent of the foregoing, but nevertheless cumulative, LEE respectfully asserts that he has also established Fitzgerald was ineffective by completely failing to investigate any possible defenses, witnesses, discovery issues, etc. See Wiggins, supra 539 U.S. at 510. Furthermore, Fitzgerald's decision not to investigate anything and instead recommend LEE accept what amounted to a "low risk" conveni-

ence plea cannot be given deference or deemed strategic, because Fitzgerald's advice was based on his *misunderstanding* of the law and misrepresentations to LEE that he would not be deported *if* he accepted the plea. See Bradshaw, supra, 545 U.S. at 183; see also Dando, supra, 461 F.3d at 799.

Lastly, LEE asserts Fitzgerald also rendered constitutionally deficient performance at sentencing when he misadvised the Court that he was a "citizen of the United States," when LEE clearly was not. (pg# 27-28, supra; also Appdx:62a) Specifically, by misrepresenting LEE was a U.S. citizen, the Court was deprived of the knowledge of a commonly relied-upon factor used by Court's consistent with their sentencing discretion under the *advisory* Guideline regime. Thus, Lee has established that there is a reasonable probability he would have received a different sentence. Porter, supra, 130 S.Ct. U.S. at 453.

Based on all of the foregoing, LEE respectfully request that this Honorable Court set aside his conviction, sentence, and guilty plea as being rendered in violation of the Constitution's Sixth Amendment guarantee to effective assistance of counsel.

Respectfully submitted,

_____

Jae Lee, pro se
Reg# ~~62711-147~~ 22715076
Adams County Correctional
P.O. Box 1600
Washington, MS 39190

CERTIFICATE

I declare under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. §2255 was filed by hand directly with the Clerk of the Court on September 24th, 2010.

_____

Jae Lee, pro se

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAE LEE, Movant, v. UNITED STATES OF AMERICA Respondent.	))))))))	Case No.: _____ (2:09-CR-20011-D)

MOVANT'S APPENDIX OF EXHIBITS

(RE: 28 U.S.C. §2255 MOTION TO VACATE CONVICTION AND SENTENCE)

Movant, JAE LEE, pro se, respectfully files this "Appendix of Exhibits" containing the relevant record material and evidence in support of his separately filed Motion pursuant to 28 U.S.C. §2255. This package contains the following:

DOCUMENT	PAGE
1. LEE'S INDICTMENT (DE:2)	1a
2. NOTICE AND RECEIPT OF FOREIGN PASSPORT (DE:12)	2a
3. GOVERNMENT'S RULE 16 DISCOVERY LETTER (DE:16)	3a-8a
4. DEA INVESTIGATION REPORT (DE:16)	9a-16a
5. MEMORANDUM OF PLEA AGREEMENT (DE:21)	17a-19a
6. JUDGMENT & COMMITTAL ORDER (DE:27)	20a-24a
7. CORRECTED JUDGMENT & COMMITTAL ORDER (DE:30)	25a-29a

Continued On Next Page....

DOCUMENT	PAGE
8. PLEA CHANGE HEARING TRANSCRIPTS (DE:20)	30a-52a
9. SENTENCING HEARING TRANSCRIPTS (DE:25)	53a-73a
10. POST-SENTENCING TELEPHONE RECORDS OF LEE	74a-85a
11. POST-SENTENCING CORRESPONDENCE OF ATTORNEY FITZGERALD TO LEE FOR INS	86a-87a
12. LEE'S DECLARATION	88a-93a

CERTIFICATE

I declare under penalty of perjury that the foregoing are true and correct and that this "Appendix of Exhibits" was filed by hand directly with the Clerk of the Court on September 24, 2010.

Jae Lee, pro se
Reg# 62711-147
Adams County Correctional
P.O. Box 1600
Washington, MS 39190

[SEAL] U.S. Department of Justice
United States Attorney
Western District of Tennessee

800 Federal Office Building Telephone (901)544-4231
Memphis, Tennessee 38103 Fax (901)544-4230

March 3, 2009

Larry E. Fitzgerald
Fitzgerald & Harris
An Association of Attorneys
100 North Main Bldg., Suite 901
Memphis, TN 38103

Re: *United States vs. Jae Lee*
a/k/a "Jae L. Williams"
Cr. No. 09-20011-BBD

Dear Mr. Fitzgerald:

This letter is in response to your request for discovery in this case, dated February 11, 2009, and received February 12, 2009.

1. As to Rule 16(a)(1)(A) and (B):

a) On or about January 7, 2009, in the presence of DEA TFO Brunson and DEA TFO Stauffer, the defendant made an oral statement after being advised of his Miranda Rights per DEA card 13. The defendant stated in substance, "I have some Ecstasy pills in a cigarette box in the dining room area. All of the narcotics recovered from the residence are mine. I did not sell the Ecstasy to anyone. I gave it away. I smoke marijuana on a regular basis. I used what little marijuana I had before the execution of the search

warrant. I use the rifle for protection. I purchased it from someone off the street for $100.00 a few years ago."

2. As to Rule 16(a)(1)(D), enclosed is a copy of your client's prior criminal history. Pretrial services also has provided you with a copy of your client's record. Should this matter proceed to trial and your client testify, the government will seek to introduce as impeachment evidence your client's prior convictions. If your client disputes any of the dates of conviction, conviction offenses, dates of release, sentences, or sentencing agencies as described on the criminal history, please contact me as soon as possible. In addition, should this matter proceed to trial and your client testify, the government will seek to introduce as impeachment evidence any felony convictions that are more than ten years old, pursuant to Rule 609(b) of the Federal Rules of Evidence, and any aliases, pursuant to Rule 608 of the Federal Rules of Evidence.

3. As to Rule 16(a)(1)(E), please be advised that government plans to introduce the following physical evidence at trial:

a) $32,432.00 United States currency

b) Check book for Mandarin Palace, banking records for Bank of America in the name "Amy Chu," and papers with names and numbers (recovered from a blue bag in the living room of the residence)

c) One brown wallet containing miscellaneous papers, records, and documents, and a set of keys recovered from the defendant's pants pocket

d) One brown briefcase with miscellaneous papers, records, documents, and photographs relating to Mandarin Palace, and a black notebook with names and numbers, recovered from the dining room area of the residence

e) Eight blue tablets ("Ecstasy," or MDMA) recovered from a cigarette box on the bookcase in the dining room area of the residence

f) Eight-eight blue tablets ("Ecstasy," or MDMA) recovered from a plastic bag in the bookcase in the dining room area of the residence

g) Plastic bag with three orange tablets from box underneath bed in master bedroom

h) Norinco Model 90 rifle with magazine loaded with 25 rounds of ammunition, found in master bedroom closet

i) 2001 Nissan Maxima, TN license plate 406-LPH

j) 1991 Honda Prelude, MS license plate DDF-134

k) Photographs of ecstasy pills (enclosed, on disc)

1) Photographs taken during execution of search warrant (enclosed, on disc)

Enclosed herein are copies of the photos (on disc). All items of physical evidence are available for copying and inspection by making arrangements with this office. Also provided are copies of the following documents: DEA Form-6 dated 1/20/09, DEA Form 7

dated 1/12/09, DEA Form 48a dated 1/22/09 (2), State of Tennessee Drug Asset Forfeiture Warrant, DEA Form 7a dated 1/12/09, SCSO Arrest Ticket and Affidavit of Complaint, photocopies of credit cards and handwritten notes (3 pages), photocopies of checks, handwritten notes, and bank records (10 pages), and an evidence log for the firearm.

4. As to Rule 16(a)(1)(F), the controlled substances recovered by law enforcement in this case were submitted to the laboratory for analysis. The laboratory reports will be provided as soon as they are available.

5. As to Rule 16(a)(1)(G), the government intends to introduce the following expert testimony:

a) A forensic sc[ient]ist/laboratory chemist will testify as an [expert] witness with respect to the series of tests performed on the controlled substances recovered in this case. This expert will testify that these tests yielded results consistent with the aforementioned laboratory reports. Documents summarizing this expert's testimony and qualifications will be provided to you before trial.

b) It is also anticipated that the United States will call Task Force Officer ("TFO") Michael Chipman as an expert at trial. TFO Chipman is a Memphis Police Department ("MPD") Officer currently assigned to the Drug Enforcement Administration ("DEA") Task Force for Western Tennessee. TFO Chipman has been employed by the Memphis Police Department for approximately 14 years. Chipman was

assigned to the DEA in 2007. Prior to that time TFO Chipman was assigned to the MPD Organized Crime Unit. TFO Chipman has received specialized training and experience in narcotics investigations, and has received DEA Basic Narcotics Training and Advanced Narcotics Training. It is anticipated that the United States will call TFO Chipman as an expert at trial in the field of narcotics investigation. TFO Chipman is expected to testify as an expert on drug trafficking "tools of the trade" as well as the modus operandi used by drug traffickers to traffic in hydroponic marijuana, "Ecstasy" (MDMA) and other controlled substances within the United States and in Western Tennessee. TFO Chipman is expected to that the defendant followed the drug trafficking modus operandi to traffic in controlled substances, including hydroponic marijuana and "Ecstasy" (MDMA). Officer Chipman is also expected to testify about hydroponic marijuana and "Ecstasy" (MDMA) quantities and prices, and related matters.

c) The United States also intends to call Keith Brown as an expert witness. Keith Brown has been employed in law enforcement since 1993, where he was initially employed with the Virginia Alcoholic Beverage Commission Board. In 1995, Brown was employed by the DEA, where he is currently the Group Supervisor of the Memphis Resident Office. Brown attended the DEA academy. He has also received specialized drug enforcement training with the DEA, including but not limited to complex conspiracy training and money

laundering training. It is anticipated that the United States will call Agent Brown as an expert at trial in the field of narcotics investigation and the execution of search warrants. Agent Brown is expected to testify as an expert on drug trafficking "tools of the trade" as well as the modus operandi used by drug traffickers to traffic in hydroponic marijuana, "Ecstasy" (MDMA), and other controlled substances in Western Tennessee. Agent Brown is expected to testify that drug trafficking "tools of the trade" were employed by the defendant in this case, and that defendant followed the drug trafficking modus operandi to traffic in hydroponic marijuana and "Ecstasy" (MDMA). Agent Brown is also expected to testify about drug trafficking codes and signals used by narcotics smugglers to communicate with each other, hydroponic marijuana and "Ecstasy" (MDMA) quantities and prices, and related matters. Agent Brown also will testify as to the process by which the DEA maintains, preserves, and destroys drugs that are seized as part of investigations.

7. As to possible Rule 404(b) evidence, please be advised that the government may introduce evidence of like and similar conduct or other crimes evidence involving your client, and will provide you with notice if we decide to submit such evidence.

8. The govern[ent] is presently unaware of any exculpat[ory evi]dence regarding your client in this case, but is cognizant of its continuing obligation pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963),

to make same available in a timely manner, should it exist. Additionally, the government is aware of its continuing obligation to make any impeachment evidence available in a timely manner, should it exist.

9. If upon receipt, you do not find an item referenced as being enclosed with this letter, please contact me immediately.

10. The government hereby requests any and all reciprocal discovery and notice to which it is entitled pursuant to Rule 16(b), the local rules, and applicable case law. Please consider this request for reciprocal discovery a continuing request under Rule 16.

11. Please feel free to contact me at (901) 544-4231 if you have any questions.

Very truly yours,

LAWRENCE J. LAURENZI
United States Attorney

By s/ Arun G. Rao
ARUN G. RAO
Assistant United States Attorney
167 N. Main Street, Ste. 800
Memphis, TN 38103
(901) 544-4231

Enclosures

cc: Clerk of the Court (W.D. Tenn.) (without enclosures)

CERTIFICATE OF SERVICE

I, Arun G. Rao, hereby certify that the on the date below, I electronically filed the foregoing with the Clerk of Court for the Western District of

Tennessee via the Electronic File System which sent notification of said filing to: **defense counsel**.

s/ Arun G. Rao
ARUN G. RAO

March 3, 2009

PRIOR RECORD:

A national and local criminal record inquiry revealed the following information for Jae Lee.

FBI#: 711869CD8 RNI#: 203417
Alias: Jae Williams, Jua Lee

Date	Agency	Charge	Disposition
09/26/1993 (Age: 24)	General Sessions Memphis, TN	1) Public Intoxication 2) Disorderly Conduct	9/27/1993: 1) Nolle Prosequi 2) Guilty, $50 fine (v)
01/07/2009 (Age: 39)	General Sessions Memphis, TN	1) Possession of a Firearm During a Dangerous Felony 2) Possession of a Controlled Substance with Intent to Manu/Del/Sell	1) and 2): Pending, set for hearing on 2/6/2009, released on $10,000 bond
Circumstances : The above charges appear to relate to the federal indictment. The affidavit of complaint asserts that officers executed a search warrant at the case address. A search of the residence allegedly recovered 88 ecstasy pills, 3 valium pills, a large amount of U.S. currency and a loaded MK90 assault rifle.			

U.S. Department of Justice
Drug Enforcement Administration

REPORT OF INVESTIGATION Page 1 of 7

1. Program Code 2. Cross Related Files 3. File No.
File 4. G-DEP Identifier
5. By: TFO ☐ [3. & 4. Redacted]
Dennis Brunson ☐ 6. File Title
At: Memphis RO ☐ LUM, Gum
☐

7. ☐ Closed ☐ Requested Action 8. Date Prepared
Completed 01/20/09
☐ Action Requested By:

9. Other Officers:

10. Report Re: Execution of Federal Search Warrant at 8288 George Brett, Cordova, TN and Acquisition of Drug Ex. 20 through 22 and Non-Drug Ex. N-50, N-57, N-81 thru N-84

SYNOPSIS

On January 7, 2009, at approximately 6:00 a.m., members of the Memphis Resident Office and the Memphis Police Department executed a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE. Pursuant to a search of the resident officers recovered eighty-eight (88) Ecstasy (MDA) tablets, three (3) Valium tablets, one (1) Norinco rifle with twenty-five (25) rounds ammunition, and numerous papers, records, documents, and photographs. Officers/Agents seized a 2001 Nissan Maxima bearing Tennessee license number 406LPN, with vin: JN1CA31D31T814241 and 1991 Honda Prelude bearing Mississippi license number DDF134, with vin: JHMBA4137MC027236. LEE claimed ownership of the Ecstasy tablets and

Valium tablets and was arrested on the State Charges of Possession of a Controlled Substance with Intent to Manufacture Deliver or Sell to wit Ecstasy and Valium, (TCA 39-17-417) and Possession of a Firearm During the Commission of a Felony, (TCA 39-17-1324).

DETAILS

1. On January 6, 2009, DEA Task Force Officer Michael Chipman presented an affidavit in regards to the search 8288 George Brett Dr., Cordova, Tennessee, the residence of Jae LEE, to Western District of Tennessee United States Magistrate Judge Tum Pham. Judge Pham reviewed the affidavit and issued a search warrant for the aforementioned location.

11. Distribution:	12. Signature (Agent)	13. Date
Division	TFO Dennis Brunson	01/26/09
District	14. Approved (Name and Title)	15. Date
	Keith Brown	01/26/09
Other	Resident Agent in Charge	

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U.S. Department of Justice
Drug Enforcement Administration

REPORT OF INVESTIGATION

(Continuation)

1. File No. 2. G-DEP Identifier
[1. & 2. are Redacted]
3. File Title
LUM, Gum
4. Page 2 of 7
5. Program Code
6. Date Prepared
01/20/09

2. On January 7, 2009, at approximately 6:00 a.m., DEA Task Force Officers D. Brunson, G. Stauffer, Memphis Police Lt. H. Williams, Memphis Police Officers C. Oslanzi, J. Robinson, H. Tellez, R. Trantham, K. Robinson, T. Pinks, K. Hailey, J. Graves and K. Crosby met at a prearranged location then travel to 8288 George Brett Dr., Cordova, Tennessee to executed the outstanding search warrant. Officers/Agents knocked on the front door of the aforementioned location for approximately one (1) minute with no response. Officers/Agents forced entry to the front door. Officers/Agent found the residence occupied by Jae LEE and Amy Eva CHU in the master bedroom. CHU and LEE were secured without incident.

3. TFO's Brunson and Stauffer advised LEE of the Federal search warrant for his residence. TFO Stauffer advised LEE of his Miranda Rights per DEA card 13 as witnessed by TFO Brunson. LEE stated that he understood his rights and wished to talk to the officers/agents. LEE stated that he

had some Ecstasy pills in a cigarette box in the dinning room area.

4. Prior to searching the residence Officer Pinks and his K-9 partner (RIP) who is trained in the detection of narcotics odors (marijuana, cocaine, heroin, methamphetamine and MDMA) examined the residence. RIP alerted for the presence of narcotics in the dinning room area, in the living room area on a blue bag and the master bedroom dresser drawer.

5. Officer/Agents conducted a systemic search of the residence and recovered the following:

Living Room area

Exhibit N-50 is $32,432.00 U. S. Currency recovered from a blue bag next to the couch in the living room by TFO Brunson. TFO's Brunson and Stauffer photographed the exhibit (Ex. N-50b) prior to placing the currency into a DEA Self-Sealing Evidence Envelope (SCEE) money bag (Ex. N-50a).

Exhibit N-83 is a check book for the Mandarin Palace, Banking records for Bank of America in the name of Amy CHU, (account number [REDACTED])

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[DEA Form 6a header and footer omitted for the remainder of original pages 3 through 7]

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misc., papers with names and numbers recovered from a blue bag in the living room by TFO Brunson.

LEE'S Person

Exhibit N-82 is one (1) brown wallet containing misc., papers, records, and documents, set of keys which was recovered from LEE's pants pocket by TFO Brunson.

Dinning Area

Exhibit N-84 is a DEA box containing a brown brief case with misc., papers, records, documents and photographs pertaining to the Mandarin Palace, and a black note book with names and numbers which was acquired by TFO Brunson from the dinning room area of the residence.

Exhibit 20 is eight (8) blue tablets (Ecstasy) recovered from a cigarette box found on the book case in the dinning room area of the residence by TFO Brunson.

Exhibit 21 is eighty-eight (80) blue tablets (Ecstasy) recovered from a plastic bag founded in the book case in the dinning room area of the residence by TFO Brunson.

Master Bedroom

Exhibit 22 is a plastic bag containing three (3) unknown tablets which was recovered from a box hidden underneath the bed in the master bedroom by TFO Brunson.

Norinco, Mod: 90, serial NO: 616901, 7.62X39, rifle with magazine loaded with twenty-five (25) rounds of 7.62X39 ammo found in the master bedroom closet by TFO Brunson.

6. TFO's Brunson and Stauffer seized a 2001 Nissan Maxima bearing Tennessee license number 406LPH, with VIN: JN1CA31D31T814241 (Exhibit N-57), (register to Alfred CHU) from LEE. The vehicle was towed to Bartlett Towing lot located at 1807 Bartlett Road, Memphis TN., for storage. Exhibit N-57 is pending Federal seizure procedures.

7. TFO's Brunson and Stauffer seized a 1991 Honda Prelude bearing Mississippi license number DDF134, with VIN: JHMBA4137MC027236, (register to Fu Hua CHEN) from LEE. The vehicle was towed to Bartlett Towing lot located at 1807 Bartlett Road, Memphis TN., for storage. On January 20, 2009, TFO's Brunson and J. Pike transported the vehicle to the West Tennessee Drug Task Force storage lot where it is pending State of Tennessee seizure procedures.

8. Prior to transporting LEE to the Memphis Resident Office he (LEE) advised TFO's Brunson and Stauffer that all the narcotics recovered from his residence were his. LEE further stated that he had used both the vehicles to transport the narcotics when he would go out to party with friends. LEE stated that he did not sell the Ecstasy to anybody, but would give it away. LEE stated that he smoked marijuana on a regular basis; however he had used what little marijuana he had prior to the officers/agents executing the search warrant at his residence. LEE stated that

he used the rifle for protection and that he purchased it from someone off the street for $100.00 a few years ago. TFO's Brunson and Stauffer maintained custody of the rifle with ammo transported it to the Memphis Police Property and Evidence Room was it was tagged under receipt number 0901000354sh.

9. LEE was processed at the Memphis Resident Office and TFO's Brunson and Stauffer transported LEE to the Shelby County Jail, 201 Poplar, Memphis, Tennessee. LEE was charged with the State charges of Possession of a Controlled Substance with Intent to Manf/Del/Sell to wit Ecstasy (TCA 39-17-417) and Possession of a Firearm during the Commission of a dangerous felony (TCA 39-17-1324).

10. TFO Stauffer advised Amy CHU of her Miranda Rights per DEA card 13 as witnessed by TFO Brunson. CHU stated that she understood her rights and wished to talk to the officers/agents. CHU stated that she had used Ecstasy and Marijuana with LEE. CHU stated that she never purchased narcotics. CHU stated that LEE would give it to her when they were partying. CHU stated that she had no knowledge of LEE's narcotic trafficking. CHU was released at the scene.

CUSTODY OF EVIDENCE

1. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009, TFO's Brunson and Stauffer seized Exhibit 20, eight (8) blue tablets (Ecstasy) from a cigarette

box found on the book case in the dinning room area of the residence. TFO's Brunson and Stauffer maintained custody of the exhibit, transporting it to the Memphis Resident Office, processed it as evidence, securing the exhibit in the Memphis Resident Drug vault until sending the exhibit to the NSRL.

2. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009, TFO's Brunson and Stauffer seized Exhibit 21 is eighty-eight (80) blue tablets (Ecstasy) recovered from a plastic bag found in the book case in the dining room area of the residence. TFO's Brunson and Stauffer maintained custody of the exhibit, transporting it to the Memphis Resident Office, processed it as evidence, securing the exhibit in the Memphis Resident Drug vault until sending the exhibit to the NSRL.

3. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009, TFO's Brunson and Stauffer seized Exhibit 22 is a plastic bag containing three (3) unknown tablets which was recovered from a box hidden underneath the bed in the master bedroom. TFO's Brunson and Stauffer maintained custody of the exhibit, transporting it to the Memphis Resident Office, processed it as evidence, securing the exhibit in the Memphis Resident Drug vault until sending the exhibit to the NSRL.

4. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009,

TFO's Brunson and Stauffer seized Exhibit N-50 ($32,432.00 U. S. Currency) recovered from a blue bag next to the couch in the living room. The U.S. currency received a positive alert by K-9 "RIP". The U.S. Currency remained in TFO's Brunson and Stauffer custody, until being transported to the Memphis RO and relinquished into the custody of the HVSRM custodian, via DEA-12. An appointment was setup with the First Tennessee Bank Vault for an official money count to occur on January 9, 2009 at 08:30am. TFO'S Price and Freeman took Exhibit N-50 out of the HVSRMC, via DEA-12, and took the exhibit to the First Tennessee Bank Vault and had the U.S. Currency converted into a First Tennessee Bank cashier's check in the amount of $32,432.00 dollars, pay to the order of the U.S. Marshal's.

5. Exhibit N-50a is a SSEE money bag which exhibit N-50 was placed into by TFO's Brunson and Stauffer. Exhibit N-50a was processed as evidence by TFO's Brunson and Stauffer and later released to the MRO NDEC.

6. Exhibit N-50b is a photograph the exhibit N-50 by TFO's Brunson and Stauffer. Exhibit N-50b was processed as evidence by TFO's Brunson and Stauffer and later released to the MRO NDEC.

7. Exhibit N-57 is a 2001 Nissan Maxima bearing Tennessee license number 406LPH, with VIN: JN1CA31D31T814241 which was seized from Jae LEE at the time of his arrest. The vehicle was towed to Bartlett Towing lot located at 1807 Bartlett Road, Memphis TN., for storage. Exhibit N-57 is pending Federal seizure procedures.

8. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009, TFO's Brunson and Stauffer seized Exhibit N-82 which is one (1) brown wallet containing misc., papers, records, and documents, set of keys that was recovered from LEE's pants pocket. TFO's Brunson and Stauffer maintained custody of the exhibit, transporting it to the Memphis Resident Office, processed it as evidence, securing the exhibit in the Memphis Resident Non-Drug vault.

9. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009, TFO's Brunson and Stauffer seized Exhibit N-83 which is a check book for the Mandarin Palace, Banking records for America in the name of Amy CHU, (account number [REDACTED]) misc., papers with names and numbers recovered from a blue bag in the living room. TFO's Brunson and Stauffer maintained custody of the exhibit, transporting it to the Memphis Resident Office, processed it as evidence, securing the exhibit in the Memphis Resident Non-Drug vault.

10. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009, TFO's Brunson and Stauffer seized Exhibit N-84 which is a brown brief case with misc., papers, records, documents and photographs pertaining to the Mandarin Palace, and a black note book with names and numbers which was acquired from the dinning room area of the residence. TFO's Brunson and Stauffer maintained custody

of the exhibit, transporting it to the Memphis Resident Office, processed it as evidence, securing the exhibit in the Memphis Resident Non-Drug vault.

INDEXING

1. LEE, Jae – [Redacted]
2. CHU, Amy Eva – [Redacted] Female Asian, DOB: [Redacted], SSN: [Redacted] POB: Memphis, TN, Address: 8288 George Brett Drive, Cordova, TN., Cellular telephone: [Redacted], Employer: Memphis Pathology Lab, Memphis, TN., BP: 901-405-82222, Passport NO: [Redacted] TNDL: [Redacted].
3. CHU, Alfred – [Redacted] Male Asian, address; 8922 Alana, Cordova, TN., registered owner of a 2001 Nissan Maxima bearing Tennessee license number 406LPH, with VIN: JN1CA31D31T814241, NFI.
4. CHEN, Fu Hua – [Redacted] Male Asian, address; 3204 RosLeight Dr., Southaven, MS, DOB: [Redacted], MSDL: [Redacted], Cp: [Redacted], registered owner of a 1991 Honda Prelude bearing Mississippi license number DDF134, with VIN: JHMBA4137MC027236, NFI.

U.S. Department of Justice
Drug Enforcement Administration

REPORT OF DRUG PROPERTY COLLECTED, PURCHASE, OR SEIZED

1. Date Prepared: 01-12-2009
2: Case #: [Redacted]
3. File Title: LUM, Gum
4. Program Code:
5. GDEP #: [Redacted]
6. Group No: MRO
7. Date Taken into DEA Custody: 01-07-2009
8. Where obtained (City, State/Country): Memphis, Tennessee, USA
9. Is this document for informational purposes only?
   ☐ No ☐ Yes
10. How obtained?
    ☐ Purchase cost per exhibit: (1)_____
    (2)_____ (3)_____
    ☐ Seized
    ☐ Money Flashed
    ☐ Compliance Sample (Non-Criminal)
    ☐ Free Sample
    ☐ Clandestine Laboratory Seizure
    ☐ Regulatory
    ☐ Internal Body Carry*
    ☐ Stockpile Reverse Undercover
    ☐ Other: _____

    * A biohazard warning label must be placed on the heat sealed evidence envelope containing the evidence acquired from an internal body carry.

11. If referral, name of referring agency:
    11a. Case #: 11b. Seizuire #:

12. If seized for forfeiture (pseudophedrine) and held as evidence or for safekeeping, was a SSF prepared?
☐ If yes, attach SSF and enter Asset ID (formerly CATS ID) # _____
Provide asset (fair market) value at time of seizure: _____
☐ If no, explain: _____

13. Exhibit #	14. FDIN #	15. Alleged Drugs
Ex. 20		Ecstasy
Ex. 21		Ecstasy
Ex. 22		unknown

16. Describe Marks on labels (Note: if original container is separate from drug, enter subexhibit # and describe original container fully.)

[Ex. 20]	1 HSEE containing 8 blue tablets.
[Ex. 21]	1 HSEE containing a plastic bag with 80 tablets blue in color.
[Ex. 22]	1 HSEE cointaining a plastic bag with 3 orange tablets.

	Approx. Gross Quantity		
	17. Seized	18. Submitted	19. Retained
[Ex. 20]	26.2 gg	26.2gg	
[Ex. 21]	48.8gg	48.8gg	
[Ex. 22]	27.5gg	27.5gg	

20. Is this a bulk drug seizure?
☐ No ☐ Yes (If yes, provide date of 60-day letter: _____)

21. Identify:
☐ N/A ☐ Threshold DEA-7 or ☐ Bulk DEA-7

22. ☐ Fingerprint Analysis Requested for exhibit(s):

22a. Compare Latent Prints with subject(s):

Name	FBI and or State ID Number(s)	Date of Birth

Identify type of prints attached

Finger	Palm	None

23. REMARKS:
On 01-07-09, a federal search warrant was executed at 8288 George Brett, Cordova, TN. Ex. 20, described above, was recovered from a empty box of cigarettes located on a book case in the dinning room area by TFO D. Brunson. Ex. 21, described above was also recovered from the book case by TFO Brunson. Ex. 22, described above was recovered from a box concealed under the bed in the master bedroom by TFO Brunson. TFO Brunson maintained custody of all the exhibits, transporting them to the MRO, processing them as evidence, and storing the exhibits in the MRO drug vault until sending them to the NSRL for analysis.

24. Type/Print Name of Special Agent/Task Force Officer/Diversion Investigator:
TFO Dennis Brunson 01-12-2009

24a. Signature and Date:

25. Type/Print Name of Supervisor:
RAC Keith Brown 01-12-2009

25a. Signature and Date:

DRUG EVIDENCE CUSTODIAN RECEIPT REPORT (FOR FIELD OFFICE USE ONLY)

26. No. Packages:
27. Print/Type Name Received From:
27a. Signature and Date:
28. SEAL ☐ Broken ☐ Unbroken
29. Print/Type Name Received By:
29a. Signature and Date:
30. Date Entered Into ENEDS/CERTS:

LABORATORY EVIDENCE RECEIPT REPORT (FOR LABORATORY USE ONLY)

31. No Packages:
32. Print/Type Name Received From:
32a. Signature and Date:
33. SEAL ☐ Broken ☐ Unbroken
34. Print/Type Name Received By:
34a. Signature and Date:
35. Laboratory #s:
    (1)_____ (2)_____(3)_____
36. Laboratory Control #s:
    (1)_____ (2)_____(3)_____

DEA Form 7 (08/07) (Previous editions are obsolete)
Copy 1 - Prosecutor

(UNREDACTED)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
VS.	)	NO. 09-20011
JAE LEE,	)	
a/k/a "Jae L. Williams",	)	
Defendant.	)	

CHANGE OF PLEA HEARING PROCEEDINGS

BEFORE THE HONORABLE BERNICE B. DONALD, JUDGE

WEDNESDAY MORNING

JUNE 17, 2009

LYNN DUDLEY
OFFICIAL REPORTER
950 FEDERAL BUILDING
MEMPHIS, TENNESSEE 38103

[2] APPEARANCES

Appearing on behalf of the Plaintiff:

LAWRENCE J. LAURENZI
UNITED STATES ATTORNEY
SUITE 800 FEDERAL BUILDING
167 N. MAIN STREET
MEMPHIS, TENNESSEE 38103
BY: ARUN G. RAO, ESQ.
ASSISTANT U. S. ATTORNEY

Appearing on behalf of the Defendant:

FITZGERALD & HARRIS
100 NORTH MAIN STREET
SUITE 901
MEMPHIS, TENNESSEE 38103
(901)522-8829
BY: LARRY E. FITZGERALD, ESQ.
ATTORNEY AT LAW

[3] WITNESS INDEX

WITNESS	PAGE	LINE
JAE LEE		
DIRECT EXAMINATION		
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[4] EXHIBIT INDEX

EXHIBIT NUMBER	PAGE	LINE
NO EXHIBITS		

[5] **WEDNESDAY MORNING**

JUNE 17, 2009

The change of plea hearing in this case began on this date, Wednesday, June 17, 2009, at 10:30 o'clock a.m., when and where evidence was introduced and proceedings were had as follows:

THE COURT: On the calendar is the matter of United States of America versus Jae Lee, also known as Jae L. Williams.

This matter is set for a change of plea in Case Number 09-20011.

Mr. Rao is here for the United States, and Mr. Fitzgerald is here for the defendant, and the defendant is present.

Are the parties prepared to proceed?

MR. FITZGERALD: Yes, Your Honor.

MR. RAO: Yes.

THE COURT: Mr. Lee, raise your right hand and be sworn, sir.

THE CLERK: Do you solemnly swear or affirm, under the penalties of perjury, the testimony that you are about to provide the court [6] in this matter will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

[7] **JAE LEE,**

was thereupon called as a witness on behalf of the Court, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q. Mr. Lee, would you state your name for the record.

A. Jae Lee.

Q. And, Mr. Lee, have you been known by any other name?

A. Jae L. Williams.

Q. Your true name is Jae Lee?

A. Yes, ma'am.

Q. Mr. Lee, what is your age and your level of education?

A. I'm 40 years old.

Q. Okay.

A. And high school.

Q. Okay. Have you ever been treated by any doctor, psychologist or psychiatrist for any mental or addictive condition?

A. No, Your Honor.

Q. You are represented by attorney Larry Fitzgerald, are you satisfied with Mr. Fitzgerald's [8] representation?

A. I'm sorry.

Q. Are you satisfied with your lawyer's representation?

A. Oh, yes, Your Honor.

Q. Has he advised you about the charges, discussed your options with you and kept in contact with you about the case?

A. Yes, Your Honor.

Q. Okay. You are hear today charged in a one count indictment which reads as follows:

On or about January 7, 2009, in the Western District of Tennessee the defendant Jae Lee, also known as Jae Williams, did unlawfully, knowingly and intentionally possess with the intent to distribute a mixture and substance containing a detectable amount of controlled 3,4-methyl-something or other, known as ecstasy --

MR. RAO: MDMA the court can use as well.

BY THE COURT:

Q. Okay. That is a long word.

In violation of Title 21, United States Code, Section 841(a)(1).

A conviction of that offense carries a maximum [9] penalty of 20 years, plus a maximum fine of one million dollars, plus three years supervised release or, after a prior drug felony conviction, not more than 30 years, plus a $2,000,000 fine maximum, plus six years of supervised release, together with a mandatory special assessment of $100.

Are you aware that that that's what you are charged with and that those are the statutory maximum penalties?

A. Yes, Your Honor.

Q. Okay. This is a felony offense, and if you are convicted of this felony offense, Mr. Lee, whether it's by trial or by plea, it could have certain negative affects on your civil rights, you could lose the right to vote, the right to possess and carry a firearm, the right to serve on a jury, and the right to stand for certain public offices.

Knowing that those important rights and/or benefits could be affected, are you still wishing to go forward and plead guilty?

A. Yes, Your Honor.

Q. And are you a U. S. citizen?

A. No, Your Honor.

Q. Okay. A conviction on this charge then could result in your being deported. It could also affect [10] your ability to attain the status of a United States citizen. If you do become a United States citizen, it could affect your rights to participate in certain federal benefits, such as student loans.

Does that at all affect your decision about whether you want to plead guilty or not?

A. Yes, Your Honor.

Q. Okay. How does it affect your decision?

A. I don't understand.

Q. Okay. Well, knowing those things do you still want to go forward and plead guilty?

A. Yes, Your Honor.

Q. Okay. There's been a plea agreement tendered. I'm going to ask you to listen as Mr. Rao summarizes the terms of the plea agreement.

And let me remind you, Mr. Lee, that at anytime during this process, if you have a question, please feel free to raise it. If you need to speak privately with your lawyer, let me know and I will let you step back and speak privately with him. Okay.

A. Yes, ma'am.

Q. Now listen to Mr. Rao as he explains the terms of the plea agreement?

MR. RAO: Thank you, Your Honor.

In summary, the plea agreement [11] provides that the defendant has agreed with the United States to plead guilty to Count One of the indictment, which charges, as Your Honor has noted, a violation of 21 United States Code Section 841(a)(1).

Pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, and in consideration for his plea of guilty there is going to a joint recommendation between the government and the defendant that the defendant receive the full three-level reduction for acceptance of responsibility. The defendant understands this is only a recommendation and that if the court does not accept that recommendation, the defendant would nevertheless not have the right to withdraw his plea.

In addition, the government will not object to a finding, if the defendant qualifies under the safety valve provisions of 18 U.S.C. 3553(f) and U. S. Sentencing Guideline 5C1.2 provided that the defendant

complies with the requirement for that reduction, including that he have no more than one criminal history point, and that no later than the time of sentencing he has, in the government's view, truthfully provided to [12] us all information and evidence he has concerning the offenses charged in the indictment in this case.

There are no other promises or representations. The defendant is to understand that the court is going to take the accurate sentencing guidelines range into account before imposing a sentence, but the defendant should also understand that the court is not bound by the sentencing guidelines and can impose any sentence within statutory limits.

If it is determined by the government that the defendant has committed or attempts -- has attempted to commit any additional crimes or has engaged in any conduct constituting obstructing justice or impeding justice or fails to make any court appearances in this case from the date of the signing of the plea agreement, that is today, to the date of his sentencing or if the defendant attempts to withdraw his plea, then the government will be released from its obligations and will be free to argue for any sentence within the statutory limits.

That breach, however, would not release you, the defendant, from your plea of [13] guilty.

There is a special assessment that is due and payable.

And the writing I've just gone over, which consist of three pages, contains the entire agreement with respect to your guilty plea, there are no other understandings or agreements.

BY THE COURT:

Q. Mr. Lee, you heard the terms of the plea agreement as summarized on the record by Mr. Rao. In listening to him, is that what you understood your agreement to be with the government.

A. Yes, Your Honor.

Q. Has anyone promised you anything other than what's contained in this written plea agreement?

A. No, Your Honor.

Q. Did you read the plea agreement for yourself?

A. Yes, Your Honor.

Q. And did you discuss it with your attorney Mr. Fitzgerald?

A. Yes, Your Honor.

Q. If you had questions, did he answer those questions for you?

A. Yes, Your Honor.

Q. And after reading the plea agreement and [14] discussing it with your lawyer and considering all of your options, did you sign the plea agreement of your own free will?

A. Yes, Your Honor.

Q. Did anyone exert any threats or pressure against you to cause you to sign the plea agreement?

A. No, Your Honor.

Q. Okay.

THE COURT: Then I shall accept the plea agreement and file it of record with the clerk of court.

BY THE COURT:

Q. Mr. Lee, you have an absolute right to plead not guilty and have your case tried before a jury on your not guilty. If you were to plead not guilty and demand a trial, we would bring in a pool of people from which a 12-person jury would be impaneled to hear proof in this case. You would have the right to have your attorney represent you at every stage of the process. The burden will be on the government to prove you guilty of this charge by proof beyond a reasonable doubt as to each and every element of the offense.

You could not be called to the witness stand against your will to testify. You could not be [15] required to present proof. If you chose not to testify or not to present proof, I would tell the jury that they could not hold that against you, that they couldn't even consider it in the process of their deliberations.

Now, if you wanted to have witnesses subpoenaed, you would have the right to have compulsory subpoenas issued to compel your witnesses to come in and testify even though they may not volunteer to do so.

And if I didn't say it already, your attorney would have an opportunity to vigorously cross examine each and every witness brought by the government to prove the government's case.

If you plead guilty today, you are giving up those trial rights. There will not be a trial. You will be

adjudged guilty based upon your admission of guilt if you choose to go forward and plead guilty.

Do you understand that?

A. Yes, Your Honor.

Q. Do you still want to do forward with the guilty plea?

A. Yes, Your Honor.

Q. Okay. Did Mr. Fitzgerald explain to you that in the federal system there is no parole. That I will [16] be the sentence judge, and once I accept your plea, there will be no right for you to withdraw that plea.

Do you understand those things?

A. Yes, Your Honor.

Q. In the process of sentencing I will use as one factor in the sentencing process the United States Sentencing Guidelines, which are advisory in nature, but in addition to these guidelines, I will also consider information that Mr. Fitzgerald will present on your behalf that might impact or help the court in determining what an appropriate sentence might be.

Do you understand that?

A. Yes, Your Honor.

Q. Any questions?

A. No, Your Honor.

Q. Okay. Please listen now as Mr. Rao explains what the government's proof would have been had this matter proceeded to trial.

MR. RAO: Thank you, Your Honor.

Had this matter proceeded to trial the government would have established that on January 7, 2009, members of law enforcement executed a federal search warrant inside of 8288 George Britt Drive in Cordova, Tennessee here in the Western District of Tennessee, that is the [17] defendant's residence.

Inside of that residence they found in the living room area $32,432. And in the dining area eight MDMA tablets in a cigarette box on the bookcase. And 88 additional MDMA tablets in a plastic bag on the bookcase.

Those tablets were field tested and tested positive for the presence of MDMA.

According to members of law enforcement, in their training and experience, the amount of MDMA recovered was consistent with distribution rather than personal use.

The defendant was arrested in the residence and spoke with law enforcement and admitted that the MDMA tablets belonged to him.

The proof at trial would have consisted of, among other things, testimony from law enforcement regarding the events that occurred and testimony about laboratory tests on the drugs.

BY THE COURT:

Q. Mr. Lee, you've heard the statement of Mr. Rao about what the government's proof would have been had this matter gone to trial, as it relates to your actions is Mr. Rao's statement true?

A. Yes, Your Honor.

[18] **THE COURT**: Then I find that a factual basis does exist for your plea.

BY THE COURT:

Q. Has anyone made any threats against you or your family to cause you to plead guilty?

A. No, Your Honor.

Q. Are you pleading guilty in an effort to try and coverup or protect someone else?

A. No, Your Honor.

Q. Are you pleading guilty out of a sense of fear, duress or coercion?

A. Oh, no, Your Honor.

Q. Then you are pleading guilty because you are, in fact, guilty of this offense?

A. Yes, Your Honor.

Q. Okay. Do you have any questions at this time?

A. No, Your Honor.

Q. Do you need to speak privately with Mr. Fitzgerald before I formally take your plea?

A. No, Your Honor.

THE COURT: Mr. Fitzgerald, is there anything else that you would have me ask your client before I formally take his plea?

MR. FITZGERALD: No, Your Honor.

THE COURT: Mr. Rao, from the United [19] States?

MR. RAO: Nothing from the government, Your Honor.

BY THE COURT:

Q. Okay. Then, Mr. Ree -- Mr. Lee -- pardon me -- I would ask you at this time, how do you plead to the charge of possessing with the intent to distribute an amount of controlled substance, and in the indictment it shows 3 comma 4 methylenedioxmethaphetamine.

THE COURT: What's the three comma four?

MR. RAO: That's the term that's used to refer to the methamphetamine, it's the prefix that I saw that is typically used to describe that substance. I don't know if there is a scientific reason for, it's not an amount.

THE COURT: Okay.

MR. RAO: It's a -- it's a reference to the --

THE COURT: Okay.

MR. RAO: -- to the substance itself.

THE COURT: Okay. So three comma four. Okay.

MR. RAO: I wish I was more familiar, Your Honor, but I believe it's -- it's -- it's [20] just part of the technical reference for the substance itself.

THE COURT: Okay.

BY THE COURT:

Q. Well, I have -- I have broken it down and I have now identified, methylenedioxmethaphetamine.

Okay. So how do you plead to this, sir?

A. Guilty.

MR. RAO: Just pointing out on that -- on that topic that Your Honor just raised, I was just flipping through the sentencing guidelines, when they're talking about different items, they describe it as three comma methylene --

THE COURT: Dioxymethamphetamine, yes.

MR. RAO: Yes.

THE COURT: Okay.

MR. RAO: So I think that's just a technical reference.

THE COURT: Thank you.

Okay. Mr. Lee --

THE WITNESS: Yes.

THE COURT: -- based upon your admission of guilt and based upon your answers to my questions during this plea colloquy I find that you satisfied all of the requirements for [21] tendering a knowing, counseled, informed and voluntary plea. I shall accept your plea and change it on the record from not guilty to guilty and will set a date for sentencing.

What is that date, Ms. Elchlepp?

THE CLERK: Thursday, September 17th at 1:30 p.m.

THE COURT: September 17th at 1:45 p.m. that will be the sentencing date, Thursday, September 17th at 1:45 p.m.

You will need to speak to the probation officer about your background and about that offense. Make certain that you answers their questions truthfully and completely.

Whatever you do, do not withhold information and do not give false information as that can only hurt you.

A report is going to be prepared for the court containing a lot of that information. And if there is anything in the report that you believe to be inaccurate or that you wish to contest, you will have an opportunity to do that at the sentencing hearing, sir.

Remember that you do have the right to have your lawyer accompany you to that probation [22] interview.

So, if you want Mr. Fitzgerald to accompany you, please let him know so that he may arrange his calendar accordingly.

BY THE COURT:

Q. Are there any questions?

A. No, Your Honor.

THE COURT: Then these parties are excused and thank you.

MR. RAO: Thank you, Your Honor.

THE COURT: Thank you.

(Adjournment at 10:52 a.m.)

[23] **CERTIFICATE**

I, Lynn Dudley, do hereby certify that the foregoing 22 pages are, to the best of my knowledge, skill and ability, a true and accurate transcript from my stenotype notes of the change of plea hearing on June 17, 2009, in the matter of:

United States of America

vs.

JAE LEE

Dated this 21st day of July 2010.

Lynn Dudley
Official Court Reporter
United States District Court
Western District of Tennessee

(UNREDACTED)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
VS.	)	NO. 09-20011
JAE LEE,	)	
a/k/a, "Jae L. Williams",	)	
Defendant.	)	

SENTENCING HEARING PROCEEDINGS

BEFORE THE HONORABLE BERNICE B. DONALD, JUDGE

MONDAY MORNING

SEPTEMBER 28, 2009

LYNN DUDLEY
OFFICIAL REPORTER
950 FEDERAL BUILDING
MEMPHIS, TENNESSEE 38103

[2] APPEARANCES

Appearing on behalf of the Plaintiff:

LAWRENCE J. LAURENZI
UNITED STATES ATTORNEY
SUITE 800 FEDERAL BUILDING
167 N. MAIN STREET
MEMPHIS, TENNESSEE 38103
BY: ARUN G. RAO, ESQ.
ASSISTANT U. S. ATTORNEY

Appearing on behalf of the Defendant:

FITZGERALD & HARRIS
100 NORTH MAIN STREET
SUITE 901
MEMPHIS, TENNESSEE 38103
(901)522-8829
BY: LARRY E. FITZGERALD, ESQ.
ATTORNEY AT LAW

[3] WITNESS INDEX

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BY THE COURT	7	6

[4] EXHIBIT INDEX

EXHIBIT NUMBER	PAGE	LINE
NO EXHIBITS		

[5] **MONDAY MORNING**

SEPTEMBER 28, 2009

The sentencing hearing in this case began on this date, Monday, September 28, 2009, at 10:15 o'clock a.m., when and where evidence was introduced and proceedings were had as follows:

THE COURT: On the calendar is the matter of United States of America versus Jae Lee, Case Number 09-20011.

This matter is set for sentencing.

Mr. Rao is here for the United States, Mr. Fitzgerald and Mr. Lee.

Are the parties prepared to go forward at this time?

MR. RAO: Yes, Your Honor.

MR. FITZGERALD: Yes, Your Honor.

THE COURT: Mr. Lee, raise your right hand and be sworn.

THE CLERK: Do you solemnly swear or affirm, under the penalties of perjury, the testimony that you are about to provide the court in this matter will be the truth, the whole truth [6] and nothing but the truth, so help you God?

THE WITNESS: Yes.

[7] **JAE LEE,**

was thereupon called as a witness on behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q. Mr. Lee, would you state your name for the record, please.

A. Jae Lee.

Q. In the last 24 hours have you consumed any drugs, alcohol or prescription medication?

A. No, ma'am.

Q. You are represented by attorney Larry Fitzgerald, are you satisfied with his representation?

A. Yes.

Q. You are here today having been convicted of possession with the intent to distribution MDMA or ecstasy in violation of Title 21, United States Code, Section 841(a)(1), a Class C felony, that carries not more than 20 years imprisonment, a fine of not more than a million dollars, not less than three years supervised release and a one hundred dollar assessment.

Are you aware that those are the penalties for this offense?

[8] **A.** Yes, Your Honor.

Q. A Presentence Report has been prepared in your case based on the advisory United States Sentencing Guidelines.

Have you had an opportunity to review and discuss the report with your counsel?

A. Yes, Your Honor.

Q. In reviewing and discussing the report, if you hadquestions, did he answer those questions for you

A. Yes, Your Honor.

Q. Okay. I'm going to go over the calculations contained in the report beginning on page Worksheet A.

You start with a base level offense of 18 under Guideline 2D1.1(c)(11) for this ecstasy offense.

There's a two point enhancement because a firearm was involved, that's governed by Guideline 2D1.1(b)(1), that takes you to a base offense level of 20.

You have no prior criminal history.

The government is making --

THE COURT: Is the government making the motion for the extra point?

MR. RAO: Yes, Your Honor.

THE COURT: That being granted.

You have a three level reduction for [9] acceptance of responsibility.

That reduces your offense level to 17.

You have a Criminal History Category of I. That yields an advisory guideline range of 24 to 30 months.

You are in Zone D of the advisory sentencing guidelines.

The fine range is five thousand to $50,000 with a one million dollar cap.

There is a one hundred dollar special assessment for this one felony conviction.

Those are the calculations.

BY THE COURT:

Q. Are there any questions about those calculations?

A. No, Your Honor.

THE COURT: The government has filed a position paper indicating that there are no objections to the report.

Mr. Fitzgerald, are there any objections.

MR. FITZGERALD: There's no objections, Your Honor.

THE COURT: The court will adopt the Presentence Report as its findings and move to the [10] sentencing phase.

I'm ready to hear from you unless there are motions in this case.

MR. RAO: No motions in this case.

THE COURT: I'm ready to hear from you, Mr. Fitzgerald.

MR. FITZGERALD: Yes, Your Honor.

Your Honor, mr. Lee up to this point, Your Honor, had been an exemplary citizen of the United States. He has been here since he was 12 years old, currently came her with a language barrier, has done very well for himself, opened up -- came to Memphis,

Tennessee some years ago and had opened up two restaurants, been doing quite well for himself except for this, I guess, what I call one glitch, one glitch, Your Honor.

He knows that it was wrong. He said he was basically, he was using ecstasy as well as selling it, Your Honor, and that's -- that probably was problem and which led to his situation, Your Honor.

But for, Your Honor, the -- the gun he would qualify for the safety valve, Your Honor, the gun was -- the law does not require that he use the gun in -- in furtherance of the crimes [11] that he committed and that he was not, I don't think there is any indication that he was, but the gun was present. And but for that gun, Your Honor, he would qualify for the safety valve, Your Honor.

Your Honor, we realize that Mr. Lee has done everything that he is supposed to do and even since he has been on this -- ever since he has been under pretrial service, Your Honor, he has no prior drug tests. He has basically done everything that he is supposed to.

What we are looking at a person who had maybe a one time -- not a one -- I'm not saying that he sold one time, Your Honor, that's not what I'm saying, Your Honor, at all, but I'm saying a one time -- let me see the way I want to describe it -- problem, Your Honor, and it led to being here.

Your Honor, I think in -- in light of the sentencing guidelines, Your Honor, I think that Mr. Lee should be put on probation since the guidelines are advisory, Your Honor. This is a situation where a man who has no -- no criminal record, none, Your

Honor, other than this one -- one offense, Your Honor.

[12] And I know it's a serious offense and I'm -- I'm not taking it lightly, Your Honor.

At best, Your Honor, I would -- I would submit, Your Honor, that maybe he should be given a six months halfway house which looking at some form of deterrent or something of that nature, Your Honor.

THE COURT: But the report says that he has been engaged in drug trafficking for ten years and that he was not caught until now. So I understand your -- your -- your one time, but I think you mean, what you are talking about is this is his first -- first offense for, you know, under the law, but the activity has been ongoing, according to the report, for a number of years.

MR. FITZGERALD: Well, Your Honor, we're talking about 300 tablets, Your Honor, that -- that's 300 tablets of ecstasy, Your Honor, I mean, that's not -- I guess, even if you took it over a ten year period, what are we talking about, 30 pills a year. I'm saying that it is serious and maybe over a period of time, but I'm saying it's not a lot, that's all I'm saying, Your Honor.

THE COURT: Okay.

MR. FITZGERALD: And I'm saying that [13] perhaps probably he was using as many as he was selling. It's one of those kind of cases when you get involved in drugs and you start using them, you start doing whatever it takes.

Although he was -- he was making a living, when you look at his financial condition, it is not one that

looks like he's in -- negative, Your Honor, he has a negative $12,000 as far as his assets and liabilities are concerned. So he has been making a living but he hasn't been able to just -- he's not rich, Your Honor, and not wealthy in any sense of the word, Your Honor.

And as I say, Your Honor, I think if we're looking at deterrence here in this case, Your Honor, and looking at the sentencing guidelines perhaps he should be sentenced to six months in a halfway house, Your Honor.

THE COURT: Mr. Rao.

MR. RAO: Thank you, Your Honor.

I think Mr. Fitzgerald has cleared it up with the court, I had some concerns with the way he was phrasing initially the one glitch. Because as the court pointed out, this has been an ongoing -- ongoing case of narcotics dealing since January of 2001, it's undisputed in the report.

[14] There were 200 ecstasy pills purchased by -- from the defendant by a confidential informant between January of 2001 and December of 2008.

There was a purchase of 15 pills in December of 2008.

And then the search warrant itself where a total of 88 ecstasy pills were recovered at that time alone.

So it's a serious offense and it's been ongoing for quite sometime.

That being said, there are some factors in the defendant's favor that I want to bring to the court's attention.

The criminal history is nonexistent, which is a very good thing for Mr. Lee.

And he has been the owner of this restaurant in Bartlett, Mandarin Palace, since 1991 and appears to have some talent in that area and is, by all accounts, in that area performing very well.

So those factors do -- do weigh in favor of Mr. Lee.

All things considered the government is recommending a low end guideline sentence in [15] the case. And I have nothing further.

BY THE COURT:

Q. Mr. Lee, is there you want to say, you don't have to make a statement but if there is anything you want to say I'm prepared to hear from you at this time.

A. Yes, Your Honor.

First, I would like to say I'm very sorry. I made a bad judgment. I made a big mistake in my life, and, please, I need a second chance so I can continue with my restaurant which I love to do.

Thank you.

Q. Okay.

THE COURT: Mr. Lee, thank you for your statement.

As you and your attorney and the government has all recognized, this is a very zero serious offense, and it's one that has been ongoing for some period of time. It was not simply one aberrant act, but apparently one time getting caught.

And while we, you know, the number of pills that we are looking at is just under 300. There is nothing to suggest that that's the universe of pills that were involved in this ten [16] year period.

And I think that it would be fool hardy to believe that the ten year term included only the three hundred.

But in any event you have no prior criminal history. You have been gainfully employed in an entrepreneurial capacity with your restaurant.

It appears that you were suffering from drug addiction.

There was a weapon involved, but you have no violent history in your report.

It appears that you would not be a substantial danger to the community if you were sentenced to something other than the advisory guideline range.

The court has to look at a sentence that is sufficient but not greater than necessary to punish you and to protect the community.

Also to avoid unwarranted disparities in the sentencing schemes.

I believe that to give a probationary sentence under the circumstances of this case would send a wrong message. But I don't believe that 24 months is necessary to get this [17] defendant's attention and to punish.

So the court is going to impose, Mr. Lee, a custody sentence of 12 months and a day.

The court is going to impose a period of three years of supervision.

And the court will impose a fine in this case of $5,000, along with a one hundred dollar special assessment.

The court is going to order you to participate in drug treatment and drug testing, to participate in DNA collection, and to avoid committing other crimes.

You must keep your address and telephone number of record with the clerk of court -- with the probation office, pardon me.

And you are not to possess any kind of weapon or any ammunition.

Remember that your rights to carry a weapon are restricted.

Your right to vote is restricted.

That is going to be the court's sentence. Now this 12 months plus one day sentence will allow you to serve a minimum amount of time and you should be able to keep your [18] restaurant going.

Are there any questions about the sentence?

MR. FITZGERALD: No, Your Honor.

THE COURT: Did the defendant waive his right to appeal?

MR. FITZGERALD: We're going to, Your Honor, yes.

THE COURT: Okay. Mr. Lee, you have the right to appeal the court's sentence. If you desire to appeal, you will need to file the notice of appeal within ten days.

Let your attorney know if you wish to appeal and he will assist you in perfecting that appeal.

Any questions?

MR. FITZGERALD: No, Your Honor.

THE COURT: Are there any other counts?

MR. RAO: If I could have one moment.

MR. FITZGERALD: Mr. Lee would like to serve his time somewhere close, his home is here in Memphis.

THE COURT: Given this defendant's record, the court will recommend that he be [19] allowed to serve his time at the Millington camp.

MR. RAO: This is a single count indictment, Your Honor.

THE COURT: And the defendant will be allowed to self report.

MR. FITZGERALD: Thank you, Your Honor.

THE COURT: And, Mr. Fitzgerald, given that Mr. Lee has two major holidays coming up, are you asking that the sentence be deferred until after the first of the year --

MR. FITZGERALD: Yes, Your Honor.

THE COURT: -- to take advantage of the holiday traffic.

MR. FITZGERALD: Thank you, Your Honor.

THE COURT: Okay. The court will allow him to -- he will not be required to serve his sentence until after January of 2010.

MR. FITZGERALD: Thank you, Your Honor.

THE COURT: Thank you.

These parties are excused.

MR. JAE LEE: Thank you.

MR. RAO: Thank you, Your Honor.

[20](Adjournment at 10:38 a.m.)

[21] **CERTIFICATE**

I, Lynn Dudley, do hereby certify that the foregoing 20 pages are, to the best of my knowledge, skill and ability, a true and accurate transcript from my stenotype notes of the sentencing hearing in on September 28, 2009, in the matter of:

United States of America

vs.

JAE LEE

Dated this 21st day of July 2010.

Lynn Dudley
Official Court Reporter
United States District Court
Western District of Tennessee

Fitzgerald & Harris
An Association of Attorneys

Larry E. Fitzgerald
J.T. Harris
Jennifer D. Fitzgerald
Attorney at Law
100 N. Main, Suite 901
Memphis, Tennessee 38103

Telephone (901) 522-8378
Fax (901) 522-8378

May 10, 2010

Re: USA v Jae Lee

To Whom It May Concern:

There was never any discussion of deportation during the negotiation of the Plea Agreement or during the Sentencing. It was my understanding that the Government was not seeking Deportation of Mr. Jae Lee.

Please feel free to contact me at my office if needed for further discussion concerning this matter.

Sincerely,

Larry E. Fitzgerald, Esquire

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAE LEE, Movant, v. UNITED STATES OF AMERICA Respondent.	)	Case No.: _____ (2:09-CR-20011-D)

DECLARATION OF MOVANT JAE LEE

Movant, JAE LEE, respectfully files this Declaration in support of his separately filed Motion pursuant to 28 U.S.C. §2255. According LEE attests to the following:

1. I am the Movant in the above-referenced action and have personal knowledge concerning theses matters.

2. At the time of my arrest, as well as in discussions thereafter during the pretrial period, I did inform my attorney, Larry E. Fitgerald, that I was not yet a citizen of the United States, but a legal resident for more than thirty (30) years since my arrival in the United States from Korean as a child. I further advised Mr. Fitzgerald that I had never returned to Korea at any time, as well as that my parents were U.S. citizens, as was my girlfriend and fiancee.

3. During the pretrial proceedings, Mr. Fitzgerald made representations to me that the Government's wished to offer me a plea deal. Part of the express conditions I had was a limited amount of jail

time, if any, because my restaurant businesses would suffer while I was away. Additionally, I expressly sought Mr. Fitzgerald assurances that I would not be deported as a result. As to the likely sentence and consequences I should expect, Mr. Fitzgerald represented that in exchange for my guilty plea the Government had agreed to recommend I receive the maximum early acceptance reduction; that they would not object to the safety-valve; and that the Government would not seek my deportation. In fact, upon seeking his reassurances, Mr. Fitzgerald claimed that my 30+ years of living in the U.S. and strong ties, in combination with a lack of prior criminal history and the small amount of drugs involved, made it impossible for the Government to deport me even if they had wanted to.

4. While discussing the options of pleading or going to trial, Mr. Fitzgerald advised me that he agreed I likely could make out a strong entrapment case, or alternatively for simple possession instead of distribution, as well as that the unseen search warrant might be invalid once reviewed, but that there was always a risk of losing at trial. As per Mr. Fitzgerald, if I lost a trial I could face three to five years in prison, as well as cause the Government to decide to seek my deportation. Whereas, if I accepted a plea, I would get probation or house arrest, and *not* risk deportation. It was based only upon these assurances from Mr. Fitzgerald that I agreed to plead guilty and not pursue my right to jury trial. Also, when I inquired of Mr. Fitzgerald as to what the search warrant revealed, he claimed that the Government was not obligated to provide a copy of the search warrant or supporting affidavit while I was engaged in plea negotiations.

5. A few days before the plea change hearing, Mr. Fitzgerald reviewed the plea agreement with me and represented that it included everything that it was supposed to. When I again *expressly* sought reassurances that there was no risk of losing my legal alien status or being deported, Mr. Fitzgerald repeated that the Government was not in any way going to be seeking deportation. In this manner, Mr. Fitzgerald further claimed that if the Government had wanted to include deportation as part of the sentence, it would have had to been included within the Plea Agreement. Thus, as Mr. Fitzgerald explained, because the plea agreement was "binding," the non-inclusion of any deportation purportedly fully protected me. It was based only on the foregoing representations and advice that I agreed to sign the plea agreement.

6. On the morning of the plea change hearing, Mr. Fitzgerald advised me the Court was going to give a series of standard questions and warnings which the law required me to say I understood in order for my plea to be accepted, but that what really mattered most was what the plea agreement stated because that was binding. During the hearing, the Court advised me a "potential" consequence was deportation. When the Judge asked me if that would cause me not to plea, I said yes and that I didn't understand why she was saying that. At that point, Mr. Fitzgerald spoke quietly into my ear and advised me the Court was just giving a "standard warning" given to every non-U.S. Citizen. Mr. Fitzgerald then further reminded me that the Government had confirmed they were not going to seek my deportation, as well as that the "binding" plea agreement did not include that I would be deported. It was only after

Mr. Fitzgerald's re-assurances quiet consolations that I agreed to go forward with the plea.

7. A few days before sentencing, Mr. Fitzgerald provided the PSI to me for review and comment. My main concern was that safety-valve had not been given and the range of 24-30 months was certainly more than probation or house arrest. Additionally, I saw that the PSI was making untrue and inaccurate claims about a "CI" and his alleged dealings with me.

8. In response to my main concerns, Mr. Fitzgerald conceded that he had not realized I would be automatically disqualified for the safety-valve, but that the advisory nature of the Guidelines and judicial discretion made it very likely the Court would still give me a below-guideline sentence based on the insignificant nature of the case. Alternatively, Mr. Fitzgerald claimed that even if some incarceration time were issued, it would not be more than one-year, which I could then reduce through the drug program and half-way house. Mr. Fitzgerald also advised me that I would be able to serve my minimal time at a Prison Camp near my residence. These assurances were very important to me because I was still operating under the belief at that time that I would not lose my legal status or be deported. Consequently, the thrust of my concern was about how my restaurant businesses would be impacted during the period I would be away from them.

9. As to my concerns about the inaccurate and untrue claims in the PSI about the CI, I reported to Mr. Fitzgerald that the the CI had never paid the $150 debt in the manner the PSI claimed. Additionally, although the PSI didn't say either way, I clarified that the debt was not for Ecstasy, but

because the CI and I had previously agreed to split on an ounce of marijuana which the CI smoked, but never provided me the money to cover his share. As well, even when he claimed he was going chip in his own money to cover costs of buying drugs for partying, he would never follow-through and leave me or other friends with the costs. I also told Mr. Fitzgerald that it was completely untrue that the CI paid me the $150 debt at my residence, or that he saw me packaging any pills because, in truth, while the CI had told me he really needed some pills to party with a new girl he had met, I did not have any. I also told Mr. Fitzgerald that I explained to the CI that I was trying to cut down on doing Ecstasy and hadn't bought any pills for a while because it was an expensive habit and my restaurant businesses had slowed down a bit due to the economy. As well, I explained to Mr. Fitzgerald that the CI the left my house without paying the $150 debt, but instead he had only offered to do so as well as cover the cost" of the 15-20 pills he needed to party with if I could get them for him.

10. I also advised Mr. Fitzgerald that: (a) in the days that followed, the CI repeatedly telephoned me over thirty-six times in one week asking me to reconsider getting him some Ecstasy as a favor so he could party with his new girlfriend; (b) that I continually refused except that after he literally telephone-stalked me, I finally gave in and agreed to get him some Ecstasy pills so the he would stop stalking me; (c) that I told the CI he needed to cover the costs and pay for the marijuana ounce we had previously split; (d) that I then went and bought pills from my source Gum Lum (who was later arrested and prosecuted), but that as I usually did, had to buy one-hundred

(100) tablets in order to get the price of $20 per pill, rather than $30 per pill; and (e) that even though I planned to use the rest of the pills for partying with friends, I never used any of them personally, as well as didn't even give any away to anybody either because I was really trying to cut down on partying.

11. With respect to the inconsistencies with the alleged controlled buy incident reported in the PSI, I explained to Mr. Fitzgerald that when I contacted the CI to pick up the fifteen (15) pills he needed, the CI told me to come to his house and pick-up the money in his mailbox, but when I went there (with a witness), an envelope containing only the $150 for the marijuana debt was enclosed, along with a hand-written note which stated "this is all I have right now." After calling the CI, he apologized and advised that he would come by my house the next day with the $300 and pick up his pills. I also advised Mr. Fitzgerald that when the CI did come to pick-up the fifteen (15) pills and pay, I engaged in a discussion about the $150 being left in the mailbox instead of the $450, and that this was the type of B.S that caused me and other friends not to want to do any favors for him. In that same discussion, I also reiterated to the CI that I was really trying to cut-back on taking Ecstasy, and that this had been the first time in a very long time that I had even gone my source (Gum Lum) for pills. As such, I noted for Mr. Fitzgerald that because the PSI stated the CI had been outfitted with a recording device, he should should obtain the audio recordings because they would reveal the CI had lied about seeing me package pills, paying the $150 debt, having "bought" pills in the past eight (8) years, and that I had only got the pills as a favor for the CI because he persisted in

calling me more than three (3) dozen times and begging for his help so he could part with a new girlfriend he had met. In this regard, I further informed Mr. Fitzgerald that I had numerous witnesses for Fitzgerald who would testify that I would never sell drugs but give them away, as well as that the CI was a "mooch" and "free-rider."

12. In response, to my reports about the CI issues, Mr. Fitzgerald advised me that these things always popped up during the PSI process, but that spending time challenging the inconsistencies was unnecessary because the small amount of MDMA pills, with or without, the CI claims would not change the ultimate sentence. Thus, according to Mr. Fitzgerald, it would be better to focus our efforts and the Court's attention on my personal characteristics As well, Mr. Fitzgerald also advised that my concern about only eighty-five (85) pills being retrieved as opposed to eighty-eight (88) was also not worthy of challenging because it would not have impacted the advisory guideline range calculations.

13. At sentencing, I had no reason to believe that I was in risk of deportation because it was never mentioned. In fact, everyone seemed to focus on trying to help get a sentence low enough so that I could get back to my restaurants as quickly as possible. After sentencing, I made arrangements with a close friend to help manage my restaurant businesses for the six (6) to ten (10) months maximum I expected to be away from them based on Mr. Fitzgerald's representations. However, instead of Millington Prison Camp, the BOP designated me to CCA-Adams, Mississippi. Upon my arrival, I soon learned that CCA-Adams was a special contract

institution for the BOP which *exclusively* housed federal inmates which were to be deported upon completion of their sentences. Shortly thereafter, prison staff confirmed that INS was planning to visit me very soon to initiate deportation proceedings. Consequently, I immediately contacted Mr. Fitzgerald, but he said I was mistaken and that I was not going to be deported. Prison staff nevertheless re-confirmed that it was Mr. Fitzgerald who was mistaken because there was no question INS was seeking to deport me. After obtaining some advice in the prison law library, I advised Mr. Fitzgerald that I needed to get a letter from him confirming that the Government had agreed not to deport me, as well as that was the advice he had given him. As well, I also likewise advised that, in addition to the letter, I needed Mr. Fitzgerald to send me him a copy of my docket from P.A.C.E.R.; plea agreement; J&C; PSI; discovery; plea change hearing transcripts; and sentencing transcripts. As outlined in my §2255 Motion, although I ultimately received the requested materials, Mr. Fitzgerald needed significant prodding from me to actually follow-through. In fact, this is why it took me more than four (4) months to get what I needed. With respect to the letter for INS confirming I was not supposed to be deported, Mr. Fitzgerald wrote: "To Whom It May Concern: There was never any discussion of deportation during the negotiation of the Plea Agreement or during Sentencing. It was my understanding that the Government was not seeking Deportation of Mr. Jae Lee. Please feel free to contact me at my office if needed for further discussion concerning this matter."

14. Upon receiving all of the materials and Mr. Fitzgerald's letter for INS, I discovered case law in

the prison law library such as the Supreme Court's recent Padilla holdings, as well as statues, which revealed that Mr. Fitzgerald had affirmatively misadvised me that I would not be deported despite relevant immigration statutes were succinct and straightforward that the count I pleaded guilty to made my deportation a virtual certainty. I do verily state that had it not been for Mr. Fitzgerald misadvising me that I would not be deported if I agreed to plead guilty, then I would have without doubt proceeded to trial with all my evidence and witnesses. Consequently, this is why I am filing this §2255 Motion.

15. Lastly, after my arrest and arrival to prison, I have been advised that the CI had proved so unreliable, untruthful, and scandalous, that the Government risked damage to the prosecutions of numerous high-level drug traffickers they were trying to build a case upon, including Gum Lum, my source for buying pills. Upon information and belief, I believe that the reason I may have been arrested was to help prosecutors with their significant Gum Lum case as well as other cases. Specifically, I have been told that prosecutors were able to negotiate a plea agreement with Gum Lum through representing to he and his attorneys that I was pleading guilty and would be testifying against Gum Lum, even though I had not agreed to do so. In turn, Gum Lum's plea led to prosecutors ability to pressure and negotiate several other pleas, cooperation, and/or prosecutions with numerous even higher-level traffickers. Mr. Fitzgerald did not inform me of any of this.

I declare under penalty of perjury that the foregoing is true and correct.

September 20, 2010.

_____

Jae Lee

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court
District Western District of Tennessee
Name (under which you were convicted): Jae Lee
Docket or Case No.: Cv. No. 10-2698-BBD
Place of Confinement:
Prisoner No.: 22715-076
UNITED STATES OF AMERICA v. Jae Lee
Movant (include name under which you were convicted)

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: Western District of Tennessee, Western Division, 167 North Main Street, Memphis, TN, 38103

(b) Criminal docket or case number (if you know): 2:09-CR-20011-BBD

2. (a) Date of the judgment of conviction (if you know): September 29, 2009 (DE: 27, 30)

(b) Date of sentencing: September 28, 2009 (DE: 25)

3. Length of sentence: one year and one day

4. Nature of crime (all counts): charged only with one count of "Possession With Intent To Distribute MDMA" pursuant to 28 U.S.C. § 841(a)(1).

5. (a) What was your plea? (Check one)

(1) Not guilty ☐ (2) Guilty ☑

(3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what

did you plead not guilty to? Charged with one count indictment only

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☑ No ☐

8. Did you appeal from the judgment of conviction?
Yes ☐ No ☑

9. If you did appeal, answer the following:

(a) Name of court: N/A

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☑

If "Yes," answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised: _____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning the judgment of conviction in any court? Yes ☐ No ☑

11. If your answer to Question 10 was "Yes" give the following information:

(a) (1) Name of court: N/A

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☑

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☑

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: N/A

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Ineffective Assistance Of Counsel (re: Deportation)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Counsel not only failed to inform Movant that a col-

lateral consequence of pleading guilty would subject him to deportation, but actually affirmatively misadvised Movant that he would not be deported if he pleaded guilty.

See movant's separately filed "Motion Pursuant to 28 U.S.C. § 2255 . . ." and exhibits. (Cv. No. 10-2698-BBD at DE:1) for further details.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why: N/A No Appeal

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If you answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed: _____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND TWO: Ineffective Assistance of Counsel (re: Investigation)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Counsel failed to conduct any pretrial investigation into possible defenses, evidence, witnesses, discovery or search warrant deficiencies, potential lesser offense options, and/or ensuring Movant received proper credit or consideration for the undisclosed benefits the Government received as a result of his plea. *See also, Movant's separately filed "Motion Pursuant to 28 U.S.C. § 2255 . . ." and exhibits (Cv. No. 10-2698-BBD at DE:1) for further details.

(b) **Direct Appeal of Ground Two**:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If your answer to Question (c)(1) is "Yes," state:
Type of motion or petition: N/A
Name and location of the court where the motion or petition was filed: _____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____
(3) Did you receive a hearing on your motion, petition, or application?
Yes ☐ No ☐
(4) Did you appeal from the denial of your motion, petition, or application?
Yes ☐ No ☐
(5) If you answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
Yes ☐ No ☐
(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed: _____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND THREE: Ineffective Assistance of Counsel (re: Sentencing)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Counsel confused the court at sentencing by misrepresenting Movant was a "citizen of the United

States," when he was not, and thus, deprived the court of the knowledge and consideration of a factor (the consequence of deportation) which is commonly relied upon as part of a court's sentencing discretion. *See also, Movant's separately filed "Motion Pursuant to 28 U.S.C. § 2255 . . ." and exhibits (Cv. No. 10-2698-BBD at DE:1) for further details.

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If you answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND FOUR: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): ____

(b) **Direct Appeal of Ground FOUR:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If you answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: Just the three grounds listed herein. They were not raised previously because claims of ineffective assistance of counsel cannot be raised until the § 2255 proceedings. _____

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A _____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:
(a) At preliminary hearing: Larry Fitzgerald, esq. 100 N. Main, Suite 901, Memphis, TN, 38103
(b) At arraignment and plea: Same attorney
(c) At trial: No trial / plea only
(d) At sentencing: Same attorney
(e) On appeal: No appeal taken
(f) In any post-conviction proceeding: N/A
(g) On appeal from any ruling against you in a post-conviction proceeding: N/A
16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☑
17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☑
(a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A
(b) Give the date the other sentence was imposed: N/A
(c) Give the length of the other sentence: N/A
(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☑
18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the on-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your

motion.* This motion was filed within the one-year limit. See Cv. No. 10-2698-BBD (DE:1).

Therefore, movant asks that the Court grant the following relief:

To vacate his guilty plea, conviction, and sentence or any other relief to which movant may be entitled.

N/A

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on Oct. 25. 2010 (month, date, year).

---

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

> A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —
>
> (1) the date on which the judgment of conviction became final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Executed (signed) on Oct 25, 2010 (date).
Note: Original 2255 (without this form filed Sept. 24, 2010 See Cv. No. 10-2698-BBD.

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. N/A

(UNREDACTED)
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAE LEE,	)	
Petitioner,	)	
VS.	)	No. 10-2698
UNITED STATES OF AMERICA,	)	
Respondent.	)	

EVIDENTIARY HEARING
BEFORE THE
HONORABLE DIANE K. VESCOVO,
MAGISTRATE JUDGE
THURSDAY MORNING
FEBRUARY 9, 2012

LYNN DUDLEY
OFFICIAL REPORTER
923-A FEDERAL BUILDING
MEMPHIS, TENNESSEE 38103

[2] APPEARANCES

Appearing on behalf of the Petitioner:

WEATHERLY MCNALLY & DIXON, PLC
FIFTH THIRD CENTER
424 CHURCH STREET
SUITE 2260
NASHVILLE, TENNESSEE 37219
BY: PATRICK TIMOTHY MCNALLY, ESQ.
ATTORNEY AT LAW

Appearing on behalf of the Respondent:

EDWARD L. STANTON, ESQ.
UNITED STATES ATTORNEY
SUITE 800
167 NORTH MAIN STREET
MEMPHIS, TENNESSEE 38103
BY: KEVIN PATRICK WHITMORE, ESQ.
ASSISTANT U. S. ATTORNEY

[3] **WITNESS INDEX**

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[4] **EXHIBIT INDEX**

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[5] **THURSDAY MORNING**

FEBRUARY 9, 2012

The evidentiary hearing this case began on this date, Thursday, February 9, 2012, at 10 o'clock a.m., when and where evidence was introduced and proceedings were had as follows:

THE COURT: All right. Good morning.

We're here in the case of Jae Lee versus United States, docket -- docket number 10-2698.

We are set this morning for an evidentiary hearing on Mr. Lee's 2255 motion to vacate conviction and sentence.

And let me have counsel identify themselves for the record.

We'll start with Mr. Lee's counsel, Mr. McNally.

MR. McNALLY: Good morning, Your Honor, I'm Patrick McNally. I'm a member of the Nashville Bar Association, and also admitted in the Middle District and Western District of Tennessee Federal Courts.

THE COURT: Thank you, Mr. McNally, and [6] welcome to this court.

MR. McNALLY: Thank you.

MR. WHITMORE: Good morning, Your Honor. Kevin Whitmore for the United States.

THE COURT: Thank you, Mr. Whitmore.

I have read the petition, or the -- the motion and the response and the reply. I have not read through the -- all of the exhibits and the transcripts, but we are ready to proceed this morning.

First, the burden is on the -- on Mr. Lee here to establish his grounds for relief under 2255.

So, Mr. McNally, are you prepared to proceed first in the presentation of the evidence?

MR. McNALLY: Yes, Your Honor, we are.

THE COURT: All right. Before we do that, do you wish to make any opening statement or any opening remarks?

MR. McNALLY: Your Honor, if we could, maybe in an effort to hone this down to what I think are the material issues that are going to have to be decided, Mr. Lee entered a guilty plea to possession for distribution of a scheduled controlled substance; to-wit: Ecstasy, in June of 2009. He was sentenced in September of 2009.

[7] The guilty plea was about nine months prior to the Supreme Court's release of United -- of *Padilla versus Commonwealth of Kentucky*. And then the sentencing hearing about six months prior to that.

He filed his motion for 2255 to set aside his -- to set aside the conviction and to vacate the conviction and to set aside his guilty plea. And it's the primarily on a claim of ineffective assistance of counsel for trial

counsel's failure to comply with the mandates of *Padilla*.

The 2255 motion was filed within the one year statute of limitations from his sentencing hearing.

The government has filed their brief or their response and raised a very interesting issue of whether Padilla is retroactively being applied.

And when we get to the closing arguments I can go through the litany of cases that literally have bounced back and forth, including in our own jurisdiction where I -- from what I -- my research even as of last night, the Sixth Circuit has not decided the issue, but there's various different opinions from the different district courts that are in the Sixth Circuit.

[8] The other circuits that have addressed it from the Third, the Tenth and the Seventh, they have literally taken opposing opinions. And I'm sure the United States Supreme Court will eventually have to give us guidance on whether Padilla is retroactively applied.

I thinks that's a -- there -- there's three issues really primarily here. One is, first, even if we had the grounds for the 2255, is Padilla going to be retroactively applied to June of 2009.

And our position is that trial counsel at that time -- the case was in the pipeline and trial counsel has a duty to be familiar with cases that the Supreme Court has taken up on cert.

The second issue is, of course, whether trial counsel advised Mr. Lee of deportation consequences or sought outside counsel from an immigration lawyer to give him advice.

And our position is that that did not happen.

And thirdly is the prejudice prong, the way the courts have been analyzing these decisions have been: One, is there a violation of the first prong *Strickland*, that is an IAC, ineffective of counsel, and I apologize if I say IAC, often I just [9] mean ineffective of counsel, meaning prong one of *Strickland*.

And then two, I call it the what if, would matter or the prejudicial prong. And our position is that Mr. Lee would have gone to trial had he known of the dire consequences of being deported backs to his county of origin, which is Korea, I should have mentioned that to begin with.

Mr. Lee is a guest in our country. He has been here for a long period of time, he's owned restaurants in this community and -- but his citizenship is of Korea.

And he -- he -- he -- and again the standard is not would he have won, this court is not today to engage in a trial, the standard is does he believe he had a reasonable defense and would have exercised his right to his Sixth Amendment right to have a trial had he known of the deportation consequences.

Thank you, Your Honor.

THE COURT: All right, thank you.

And, Mr. Whitmore, do you wish to make any opening remarks before we proceed to put on the proof?

MR. WHITMORE: Briefly, Your Honor.

[10] May it please the court, for the most part what Mr. McNally said I also would agree. However, I think there is a factual dispute that Your Honor is

going to hear, Mr. Fitzgerald did mention to him the possibility of being deported and his issue -- the issue of deportation.

Secondly, what you're going to hear is that there was always a possibility in his mind that that could happen from Mr. Fitzgerald's standpoint, but he did not engage in a full analysis of it as it relates to contacting any immigration attorney, but he specifically brought that issue up.

Next, Your Honor, during the change of plea, and this court knows that if this court were to handle a change of plea and someone was asked the question, are you a U. S. citizen and that person responds no, this court would at that point advise the person of deportation as a possibility.

In this particular case Judge Donald did that.

To the extent, Your Honor, there's an issue of -- and I believe it goes beyond whether or not there would be a different outcome, that had he known the possibility of being deported that he would not have pled guilty.

[11] But I think Mr. McNally pointed out that did he have a plausible defense that would allow him to prevail. And Mr. Fitzgerald is going to testify that based on his analysis in looking at the evidence he did not think he did and that was one of the reasons that he pled guilty.

If he had a plausible defense, I think Mr. Fitzgerald is going to testify he would have taken this case to trial.

And -- and the court know we should not get into a full-blown issue as it relates to a hearing, but we must access whether or not he had a plausible defense. And -- and so for the purpose of -- of this

hearing, Your Honor, we would certainly be relying on the evidence that would be presented to this court as well as what we have filed in our motion.

Thank you.

THE COURT: Thank you, Mr. Whitmore.

All right. We will proceed to hear the proof.

Mr. McNally, you may call your first witness.

MR. McNALLY: Your Honor, we would call [12] Mr. Lee.

THE COURT: All right. And is there a rule -- does anybody request the rule of sequestration of witnesses?

MR. McNALLY: Please, Your Honor.

THE COURT: Mr. -- Mr. Fitzgerald, I believe you may be a witness in this case today instead of an attorney today. So I will ask you to wait in the witness room until you are called.

And you have been provided the lapel mics, too, if you would want to put those on, you may.

All right. And, Mr. Lee, you have been called as a witness stand. If you will stand, please, and be sworn in, and then you may have a seat over here in the witness box.

You can come forward to be sworn in.

All right, that's good.

THE CLERK: Do you solemnly swear or affirm, under the penalties of perjury, the testimony that you are about to provide the court in this matter will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Thank you, please be seated.

MR. McNALLY: Candidly, Your Honor, I'm [13] kind of more comfortable at the podium if that's all right.

THE COURT: And that's fine, and you don't need the lapel mic on if you are at the podium. I think we are picking your voice up just fine and as long as Mr. Dudley can see and hear you.

MR. McNALLY: It's just easier for me to look at Mr. Lee from here rather than turn sideways. So --

THE COURT: Thank you.

MR. McNALLY: Thank you, Your Honor.

[14] **JAE LEE,**

was thereupon called as a witness on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McNALLY:

Q. Mr. Lee, you've been identified before you took the witness stand, but for the record and for everyone in the courtroom, would you please state your full name and just give us a little background about where you are citizen, and a little bit about when you came into this country and where you started to live here.

Okay.

A. Yes. Hello --

THE COURT: And, Mr. Lee, the same thing applies to you, let me get you to speak directly into the mic and you may want to slide up as far as you can to make sure Mr. Dudley can see you as well.

Thank you.

A. Well -- good morning.

My name is Jae Lee. I came to United States 1982 as a legal permanent residence, my family. And we came through, I believe it was somewhere Alaska was cold, and then came to Brooklyn, New York. [15] That's where my parents had moved into apartment, and that's where I went to junior high school. And my parents open up a little coffee shop, upper Manhattan, New York.

All my life that's where I grew up until after high school, where I graduate from a business high school in Manhattan, New York. Then I move to Memphis around -- I've been there about a little over 22 years. And I worked in a restaurant for about three or four years, then I opened my own business, little help from my parents.

And I had a business for about a little over 20 years. And I also have another second restaurant I opened up and I also have that around six years, also.

And that's all I've been doing my life working 12 hours a day, seven days a week, and it's the only thing I'm good at is the restaurant business.

Thank you.

Q. Okay. Mr. Lee, how old are you currently?

A. I'm 43.

Q. And you came into this country, as you described, sometime during elementary or junior high school, correct?

[16] A. Junior high school.

Q. All right. And you attended school in New York city -- in the state of New York?

A. Yes.

Q. And completed high school, too?

A. Yes.

Q. And so then most of your teenage years or all of your teenage years, and including currently to this date, your adult life has been in the United States of America?

A. Yes.

Q. Significantly longer period of time than you had been in Korea, your country of birth?

A. Yes.

Q. Which country do you consider to be your home?

A. USA.

Q. Okay. Now let's describer what a legal permanent residence means.

You're familiar with that terminology, right?

A. Yes.

Q. Okay. Having come into this country as a legal permanent residence, that means that you can stay in this country permanently, correct?

A. Yes.

[17] Q. Okay. Do you have to occasionally reapply for what's sometimes referred to as the green card for permission for staying in the country?

A. No, I don't.

Q. Okay. In fact, you are able to stay here permanently unless something happens that would remove you, correct?

A. Yes.

Q. Okay. Do you have family still in this United -- in the United States of America?

A. Yes. Both of my parents is here and they still live in Brooklyn, New York and they are United States citizens.

Q. Okay. So they -- they did become citizens?

A. Yes.

Q. All right. Now you mentioned that you moved to Memphis, Tennessee?

A. Yes.

Q. And started working in the restaurant business?

A. Yes.

Q. Okay. What was the name of the first restaurant that you had opened up?

A. It called Mandrin Palace Chinese Restaurant.

Q. And where is that located?

[18] A. It's in Bartlett, Tennessee.

Q. All right. And then you opened a second restaurant, correct?

A. Yes.

Q. And where was that?

A. It's in Memphis, Tennessee.

Q. Okay. Now I'm going to jump a little bit ahead here.

In June of 2009 you entered a guilty plea in Federal District Court here in Memphis, Tennessee in the Western District of Tennessee, correct?

A. Yes.

Q. And you were sentenced in September of 2009?

A. Yes.

Q. All right. Did you get a sentence to serve?

A. Yes.

Q. All right. What was that sentence?

A. Twelve months and one day.

Q. Okay. Followed by three years supervised release?

A. Yes.

Q. Okay. Did you go and serve your sentence?

A. Yes, I did.

Q. While you were serving your sentence, were you able to keep your restaurant or restaurants [19] going?

A. It was real hard, but I still managed to keep it open.

Q. Okay. One or both of them?

A. Both of them.

Q. Both of them. Okay.

And since serving your sentence, then you went into the custody of ICE, correct?

A. Yes.

Q. And what does ICE stand for?

A. Immigration Custom Enforcement.

Q. Okay. And they took you into custody when?

A. December 8, 2010.

Q. Okay. Now have you -- and you have been in their custody in Oakdale, Louisiana or Millington, Tennessee --

A. No --

Q. -- since then, right?

A. Oakdale, Louisiana and Jeanah (phonetic), Tennessee.

Q. Okay. Now have you been able to keep your restaurants going?

A. Yes.

Q. Okay. Been difficult?

A. Very difficult.

[20] Q. Okay. How have you been able to keep your restaurants going while in custody?

A. Well, I just have lucky enough landlord is just waiting for me to, you know, get back on my feet and come out.

So I would say I'm very lucky man to have people like that, you know, waiting for me regardless -- regardless I'm behind on so many things, because they know I'm in suppression and finished up my things that I have to finish and that was giving me the chance to, you know, come out and run the restaurant.

Q. All right. So you've been -- you -- you moved here with your parents to the United States of America, you were educated here, you opened businesses, and you still have businesses going here?

A. Yes.

Q. Okay. Now, and prior to ICE picking you up in December of 2010, you've never had any difficulty remaining in this country, correct?

A. Correct.

Q. Were you eventually charged, and some of these questions are going to be obvious, but I'm asking them kind of open-ended to you, okay.

[21] Were you eventually charged in the Federal District Court for the Western District of Tennessee with a criminal offense?

A. Yes.

Q. And what was that offense?

A. It was possession with intent to distribute ecstasy.

Q. Okay. Did you hire a lawyer?

A. Yes, I did.

Q. Who was that?

A. It was Mr. Attorney Larry Fitzgerald.

Q. Okay. Do you remember roughly how long before your guilty plea in June of 2009 that you had hired Mr. Fitzgerald?

A. Probably four months.

Q. Okay. Let me see if I can help you a second.

You were indicted, do you remember being indicted in January of 2009?

A. Yes, uh-huh.

Q. Okay. And obviously the indictment was served on you, right?

A. Yes.

Q. Okay. Did you hire Mr. Fitzgerald before or after you were indicted?

A. After I was indicted.

[22] Q. Okay. And he was the only attorney representing you on this charge, correct?

A. Yes.

Q. All right. Did he go over the indictment with you?

A. Yes.

Q. Did he talk about the United States Sentencing Guidelines that might be applicable to your case?

A. No.

Q. Okay. Did he talk to you about possible defenses on the case?

A. Yes.

Q. Okay. And did you tell him what you thought were some viable defenses that you would have in the case?

A. Yes, I did.

Q. Okay. But a decision was made to enter a plea of guilty, correct?

A. Yes.

Q. What was the -- what was that decision, I'm going to ask you to share it with us now in your discussions with Mr. Fitzgerald what brought you to the decision to enter the plea of guilty to the charge?

[23] A. He said we could make out, you know, a simple possession or CI's credibilities, entrapment defense, but he said it's a litigation risk going to trial, and it's very risky going to trial with that and if you losses, you are looking at three to five years, and they will sic deportation on you --

Q. Uh-huh.

A. -- so instead of going through all of that, why don't we take look at the plea deal, what the government offer you. And he advised me there was -- for exchange for my plea, guilty plea, the government will deduct three point for acceptance of responsibility, and safety valve, they won't object to safety valve, and they are not going to seek deportation. Just because the safety valve you might have -- get probation, you probably have house arrest --

Q. Okay.

A. -- and go through the drug program.

Q. All right. I asked you a question about whether Mr. Fitzgerald discussed with you the United States Sentencing Guidelines and you had said no, probably

a better question would be he discussed possible sentences with you, didn't he?

A. Yes.

[24] Q. Okay. Sentences that you could be looking at, as you described, three to five years?

You will need to say yes or no for the record, okay.

He discussed with you sentences of possibly three to five years if you went to trial?

A. Yes.

Q. Okay. And then he discussed with you things like acceptance of responsibility, and he discussed with you safety valve, and -- and the government's offer, right?

A. And not seek deportation.

Q. And not the seek deportation. Okay.

And that was goes into the next area that I was going to ask you about.

Mr. Fitzgerald did talk about the possibility that this could result in deportation with you, didn't he?

A. Yes.

Q. All right. And that was in consideration if you went to trial the government could seek deportation, right?

A. Yes.

Q. And then he said if you, from what you testified today, that if you accepted the plea [25] bargain that they would not seek deportation?

A. Correct.

Q. He did not ever talk to you about the fact that if you pled guilty to this offense it was automatic deportation, did he?

A. No.

Q. He did not ever discuss with you the terminology like an aggravated felon would result in automatic deportation, did he?

A. No.

Q. He didn't talk to you about the fact that if you pled guilty to possession or possession with the intent to distribute scheduled controlled substance like ecstasy, you would be deported?

A. He didn't talk about that.

Q. He didn't -- did he ever meet with you with an know immigration lawyer?

A. No.

Q. Okay. Did he -- did he ever direct you to an immigration lawyer to go hire an immigration lawyer to discuss the case?

A. No.

Q. Now I want to backup a second, I forgot to ask this question, did you hire Mr. Fitzgerald or was he appointed to represent you?

[26] A. I hired Mr. Fitzgerald.

Q. Okay. So there were no discussions about getting reliable information about whether this guilty plea would result in deportation?

A. No, not at all.

Q. Okay. Did he ever discuss with you that the U. S. Attorney cannot guarantee that you would not be deported -- be deported by ICE or an INS judge?

A. No.

Q. Okay.

A. Can I say something?

He --

Q. Yes, I guess so.

THE COURT: Go ahead, it's up to you.

BY MR. McNALLY:

Q. Yes, Mr. Lee, go ahead. It's your day today.

A. Every time I ask him about that because, you know, I was worried about the deportation, my immigration status. And he always said why you are worrying about something that you don't need to worry about, you have been in the United States so long they cannot deport you. Even if they want to deport you, it's not in the plea agreement, the government cannot deport you. So he was like, one point he was pretty upset because every time [27] something comes up I always ask about immigration status.

Q. It was as if the immigration question was sort of a road block of getting through the guilty plea?

A. I guess, you know.

Q. And I -- I apologize for characterizing things here, Your Honor.

A. That's all.

Q. I'm sorry?

A. That's all.

Q. Okay. Thank you, that is helpful.

Mr. Lee, you're obviously a businessman as well as understanding how to -- how to prepare food in -- in the restaurant business, right?

A. Yes.

Q. As a businessman, if you thought you were going to be deported, would you have started making arrangements to sell your restaurants?

A. Yes.

Q. Why?

A. Because I'm not going to leave behind, you know, for -- for other people to suffer that I'm getting deported and leave all of that stuff behind, you know, I will make arrangement to sell the [28] restaurant, make sure those peoples that work for me, you know, knows that they are going to have a job or all of the other stuff.

Q. Okay. So you would want to reap the profit of the hard work you put in and also take care of the people who were working for you to make sure there was some transition to a new owner to run the restaurant?

A. That's correct.

Q. All right. Would you have started making some arrangements with your family that's still here in this county?

A. The only thing I have is my parents, and they are pretty old right now --

Q. Okay.

A. -- and I'm the only child left to take care of them and so I don't know they are going through a hard time right now.

Q. So that would be something to consider about whether you are going to be deported as a result of your guilty plea or not, the care of your parents?

A. Yes.

Q. That was a lousy question.

The care of your parents is a factor to consider if you thought you were going to be [29] deported?

A. Yes.

Q. Okay. Did you engage in -- well, first, did you think that you would be deported as a result of the guilty plea?

A. Not at all.

Q. And is that for the reasons that you have already stated in your conversations with Mr. Fitzgerald?

A. Yes.

Q. All right. Now during the guilty plea, during -- during the hearing on the change of your plea to guilty; you remember that, right?

A. Yes.

Q. And you were present in court?

A. Yes.

Q. You reviewed a transcript of that?

A. Yes.

Q. And in there the judge actually asked you, do you understand this could result or this might, I think the word was might possibly result in deportation?

A. Yes, she did.

Q. Or even that you might not be able to become a U. S. citizen?

[30] A. Yes.

Q. Both of those are in there --

A. Yes.

Q. -- in the same sentence nearly?

A. Yes.

Q. Okay. The fact that it might result in deportation or, if you are not deported, you might not be able to become a U. S. citizen?

A. Yes.

Q. Okay. To you was that a lot of mights, maybes, could bes?

A. Yes, might, might deportation, might not become a U. S. citizen, but she also say, if you do become a U. S. citizen, I would lose certain benefits.

Q. Right, you would lose some benefits because of a drug conviction if you became a U. S. citizen?

A. Yes.

Q. All right. When the *Padilla* decision came out, what did you do?

A. When I first read the *Padilla* decision?

Q. Yes, sir.

A. I said, well, this just like me, almost exact same as what I'm going through right now.

My trial attorney, Mr. Fitzgerald, not only [31] did -- not only did he not advise me of the, you know, automatic mandatory deportation if I plead guilty to possession with intent to distribute ecstasy, but he actually advise me if I take the plea, I will not be deported.

Q. Okay. So a lot like Mr. Padilla, you had been in the country 20, 25 years, been a businessman and were making the decision whether to plead guilty to and take the government's offer or not with the idea that you would not be deported?

A. Yes.

Q. Okay. Was there any question in your mind that you could or would or might be deported?

A. At the time, no.

Q. Okay. Obviously by December of 2010 you became painfully aware of it?

A. Yes.

Q. Okay. You filed your own motion for a 2255, didn't you?

A. Yes.

Q. Okay. And you submitted all of the supporting information that's attached to it as -- as exhibits, correct?

A. Yes.

Q. All right. One of those exhibits was a [32] letter from Mr. Fitzgerald to you, is that correct?

A. Yes.

Q. Would you please tell us a little bit about the circumstances regarding obtaining that letter?

A. Well, when I was incarcerated I was talking to the case manager, and she told me that after I finish my sentence I would have a detainer from ICE. And I asked her why is that? And she said, you know, you might be deported. So that's when I contact attorney Fitzgerald say, what's going on, you know, I'm over here and they say after I finish my sentence that I will get deported. And he said, nah, they not -- you are not getting deported, don't worry about it, maybe because you have a ICE detainer on you that want to make sure that you are here legally and in prison there's a lot of people have no paper, they are here illegally.

So I go back to my case manager and ask her, I say, is anybody in this prison that's illegal -- illegal, I mean, what's going on. And she said everybody in this prison, after they done time, they all get deported.

That's when I contact Fitzgerald again and ask him, okay, the INS going to come visit me soon and I need you tell me like you -- we had agreed [33] with

the U. S. Government that they would not seek deportation on me if I take the plea. So that's what the letter came from, Mr. Fitzgerald said, okay, I'm going to write this letter to INS so you can show it to them that the government is not seeking deportation of me.

MR. McNALLY: I don't know the protocol here, but if I may present a document to the witness, please.

THE COURT: And you have shown that to Mr. Whitmore?

MR. WHITMORE: Yes, he did.

MR. McNALLY: I did.

MR. WHITMORE: No objection.

THE COURT: Okay. You may pass that to the witness.

BY MR. McNALLY:

Q. Mr. Lee, take a moment to look at the piece of paper I've handed to you, please.

Do you recognize that sheet of paper?

A. Yes.

Q. What is it?

A. It's a letter from Mr. Fitzgerald.

Q. Is it the one that you have been referring to here today?

[34] A. Yes.

Q. Could you read it, please --

MR. McNALLY: Well, actually I need to ask to have it marked as an exhibit prior to reading it, Your Honor.

THE COURT: All right. Any objection?

MR. WHITMORE: No objection, Your Honor.

THE COURT: All right. We will mark the letter from Mr. Fitzgerald Exhibit 1.

If you will pass that, Mr. Lee, to Ms. Guy right here, and she will put a sticker on it.

Thank you.

And that is admitted into evidence.

MR. McNALLY: Thank you, Your Honor, I was going to ask to do that after he read it, but that will be great.

Thank you.

(Exhibit Number 1 was marked; Description: Letter.)

BY MR. McNALLY:

Q. Mr. Lee, would you please read out loud what the letter says?

A. It says:

"To whom it may concern:

"There was never any discussion of [35] deportation during the negotiation -- negotiation of the plea agreement or during the sentencing. It was my understanding that the government was not seeking deportation of Mr. Jae Lee.

"Please feel free to contact me at my office if you need for further discussion concerning this matter.

"Larry Fitzgerald."

Q. Thank you.

If you can hand that back to the court, please.

And is that consistent with what your understanding of -- that the government was not seeking deportation of you?

A. Yes.

Q. All right. And when you heard the word government, what did that mean to you?

A. I means to me it's government, judge, prosecutor, and the whole United States.

Q. Okay. Well, let me breakdown the whole United States then for you, okay.

Obviously you mentioned the judge, the prosecutor, and when you say prosecutor, you mean a member of the U. S. Attorney's office, right?

[36] A. Yes, it did, I'm sorry.

Q. Did that also in your mind mean INS or Immigration Naturalization Service?

A. Yes, the whole -- yes, that's what I meant, the whole United States.

Q. Okay. ICE as well?

A. ICE, INS.

Q. All right. You said you did discuss with Mr. Fitzgerald possible defenses of your charges, right?

A. Yes, correct.

Q. Did he go over with you what the government would have to prove beyond a reasonable doubt to find you guilty of the charge of possession with the intent to distribute ecstasy?

A. No, he did not.

Q. Okay. Did you know what the proof was though?

Did you know that -- obviously you know that a search warrant was conducted of your premises?

A. Yes.

Q. And what, 96 pills, I believe it was, was found in your -- in your --

A. No, that's incorrect.

Q. Okay. How many pills were found?

[37] A. There was 85 --

Q. Okay.

A. -- but I was -- I would let Fitzgerald know that all the numbers are incorrect. He says it doesn't make -- it doesn't matter.

Q. All right. And so in the discovery it said 96, but what you said --

A. 85 --

Q. -- was 85 --

A. -- 88, 80, I don't know, it's all different.

Q. Okay. And did you know that there was a confidential informant involved in the case?

A. Not until I saw a PSR.

Q. Okay. And this -- supposedly this confidential informant had sold you some ecstasy at times?

A. Sold me some or --

Q. Yes.

A. No.

Q. Okay. Now let me ask you then, what in your mind would have been possible defenses of the charges against you?

A. For simple possession, for personal use of ecstasy, like a party, go party and give it away friends. And the only reason I got that for CI is [38] he was -- I was doing a favor for him to get some ecstasy for him for his going to the party.

Q. Okay. So you held some ecstasy and you would use it?

A. Yes.

Q. Okay. You know that's against the law?

A. Yes.

Q. And your thought was that the possible defense was simple possession?

A. Yes.

Q. Okay. You also had some concerns about the validity of the search warrant, correct?

A. That's correct.

Q. Okay. And in exchange for the plea offering, you gave up challenging the search warrant?

A. That's correct.

Q. I think, and I believe you discussed it with me as a motion to suppress the evidence obtained as a result of the search warrant?

A. Yes.

Q. All right. Did you discuss with Mr. Fitzgerald the points that you thought were in error of the government's proof?

A. Yes, I did.

Q. You brought those out to him?

[39] A. Yes.

Q. Including things stated in the affidavit for the search warrant?

A. Yes.

Q. What did he say?

A. Don't worry about it.

Q. Because you were entering the plea of guilty?

A. Correct.

Q. All right. Did he discuss with you that you have to give up filing a motion to suppress the evidence taken from your home if you were going to go forward with the plea of guilty?

A. Yes, he did.

Q. Okay. And did you understand that was also part of the guilty plea was surrendering or giving up challenging the evidence?

A. Yes, correct.

Q. All right. Had you known that you were going to be deported, what would your decision have been?

A. I would have been taken to a trial all the way with my strong evidence and my witnesses.

Q. What would your witnesses have said?

A. Well, they would say exactly what I stated, I'm not a distribute drugs, I'm a hard working man in restaurant. I may party using ecstasy and give [40] it away to friends, that's what my witness would say.

Q. Okay. Did you identify these witnesses for Mr. Fitzgerald?

A. Yes, I did.

Q. Okay. Do you know if he ever went out to interviewed them?

A. No.

Q. Did he have ever have them come into is office to interview them?

A. No.

Q. Okay. You described it before that there was -- the words you used was litigation risk; was that what Mr. Fitzgerald told you about?

A. Yes.

Q. Okay. So is it your testimony today, had you known of the consequence of being deported that you would have engaged in the litigation risk?

A. Yes, sir.

Q. Including challenging the evidence that was seized from your home?

A. Yes.

Q. And if you lost on that, then proceeding to trial with your witnesses and your proof?

A. Yes.

[41] Q. Okay. For everyone's benefit, would you please tell us today where you stand on the deportation proceedings?

A. I don't quite understand that.

Q. I apologize.

Obviously you are being held in Louisiana?

A. Yes.

Q. By ICE?

A. Yes.

Q. Okay. Where are you in the process of INS regarding being deported, not deported, or where do you stand?

A. I've been ordered deported since August 2011.

Q. Let me make sure that's clear on the record what you said.

You have been ordered deported since August of 2011?

A. Yes.

Q. And why have you not been deported?

A. Because for this -- the motion I filed and I've -- my embassy to get a travel document, they would not

give me a travel document, they feel that I have strong case of win this case. And then somebody wrongfully back to country that they never been before and destroy their life and everything [42] they are accomplishing in the United States.

Q. Okay. So we're real clear I'm going to repeat, and, please correct me if I state anything wrong. Okay.

The Korean will not issue you travel documents in your -- for your country of origin, your country of birth because you really have no ties there and they feel like you have a chance of prevailing here to get your case, your -- your guilty plea set aside?

A. Yes. And they don't want to destroy my family wrongfully by sending me there, they found that I'm innocent, and it would destroy my family, my parents, and my business all the 20 years I accomplish for my restaurant business.

Q. Okay. I'm going to step out here.

Mr. Lee, is there anything that I have failed to ask you that you feel is important and relevant to the proceedings today because it is your day in court?

A. No.

Q. Okay. Sit tight, you will have to answer the Assistant United States Attorney's questions now. Okay.

A. Okay.

[43] THE COURT: Thank you.

Mr. Lee, you do have water there if you are able to get that water.

Okay. Mr. Whitmore, you may cross examine Mr. Lee.

CROSS EXAMINATION

BY MR. WHITMORE:

Q. Good morning, Mr. Lee.

A. Good morning.

Q. My name is Kevin Whitmore and I represent the United States. I want to ask you a few questions as it relates to this. And -- and I think it's better if we start where we left off as it relates to the charges that you are facing.

Now it is -- it is your understanding that you were charged with possession with intent to distribute ecstasy?

A. Yes.

Q. It is also your understanding that there was a search, not necessarily your understanding, in fact there was a search warrant executed at your residence, correct?

A. Yes.

Q. Okay.

MR. WHITMORE: And may I approach, Your [44] Honor?

THE COURT: You may.

BY MR. WHITMORE:

Q. Mr. Lee, how long have you been using ecstasy?

A. Pretty long time.

Q. Okay. And how long have you been giving ecstasy to friends?

A. Pretty long time.

Q. And you do know that ecstasy is a illegal substance?

A. Yes.

Q. As a matter of fact, when you purchase ecstasy, you make sure that you -- you -- you purchase it in a way where -- where it is not known that you are, in fact, buying ecstasy, is that correct?

A. Yes.

Q. Because you understand the illegal nature of it?

A. Yes.

Q. And you understand, in fact, there may be consequences if you are caught with ecstasy, correct?

A. Yes.

[45] Q. I would like to show you --

MR. WHITMORE: Your Honor, may I have this as a composite exhibit since they are photos or would you prefer one --

THE COURT: A collective exhibit is fine.

Any objection --

MR. McNALLY: No, Your Honor.

THE COURT: -- Mr. McNally?

All right. You want to -- we will mark two for identification.

MR. WHITMORE: Yes, for identification.

THE COURT: Yeah.

(Exhibit Number 2 was marked; Description: Photographs.)

BY MR. WHITMORE:

Q. Let me know whether or not you recognize these documents?

A. Yes, I recognize them.

Q. Can you briefly tell the court what -- what these are photos of?

A. This one when they executed a search warrant at my residence, and I had obtained this little, like CD disk looking from Mr. Fitzgerald. He gave it to me and told me to look at it for yourself.

Q. So you actually received a CD of these [46] pictures?

A. Yes.

Q. And this is just a dov'nload or copy of these other pictures --

A. Whatever it is on the CD, yes.

MR. WHITMORE: Your Honor, at this time I would like to offer into evidence --

A. But he never looked at it though. Mr. Fitzgerald never looked at it. He gave it to me to look at it. When I bring back the CD he said what was in it, so I told him what was in it.

THE COURT: All right. These pictures will be marked collective Exhibit 2 and admitted into evidence.

(Exhibit Number 2 was marked; Description: Photographs.)

MR. McNALLY: Your Honor, if I may inquire, we need to make a note, how many pictures were there?

THE COURT: Let's see, one, two -- seven.

MR. McNALLY: Thank you, Your Honor.

THE COURT: Thank you.

BY MR. WHITMORE:

Q. If you can can you describe, and we are just going to turn the page, can you describe the first [47] document, the first photo?

A. It's my book case shelf.

Q. Looking more for a box, is it cigarettes?

A. Just cigarettes.

Q. Is that where you hid the -- the ecstasy?

A. There was some in there.

Q. I mean, did you intend to put them in there in order to hide them?

A. No.

Q. Well, why would you put ecstasy in a -- in a --

A. Because when I go out -- when I go out party and stuff, I put it in there to carry it with me.

Q. In other words, you don't want it -- you don't want it known that you are in possession of illegal substance, correct?

A. Yes.

Q. Okay. And if you turn the page.

And is that a copy of it, once you open up the Marlboro box?

A. I can't really see what's in there, it just, to me, it's just plastic wrapper.

Q. Okay. Turn the page.

And what do you see next?

I think that would be the third sheet?

[48] A. Yes, it's the third sheet.

Some papers, pictures, staplers and --

Q. So that's of your book case, is that a picture of your bookcase?

A. Yes.

Q. And where would you conceal the illegal substances that the ecstasy, would you conceal it in that area?

A. What do you mean I conceal the area?

Q. I mean, would you hide the drugs in -- in that particular area?

Where that photo is?

A. No, it wasn't over there.

Q. Okay. Can you turn the page.

THE COURT: Counselors, let me ask a question here, this is bothering me right now, if he prevailed on his 2255 and the conviction was set aside; does that mean that he can be retried; can his testimony here be introduced as evidence.

MR. WHITMORE: Yes, Your Honor.

THE COURT: All right. I mean, is this a proper line of questioning in between -- in the 2255 because I'm trying to decide if it exceeds the scope of the direct.

MR. WHITMORE: Your Honor, to the extent [49] that the defendant has taken the stand in a 2255 to put on evidence to support his claim, it's -- it's -- it's -- it's pertinent that we get into the issue of whether or not he would have prevailed if we are talking about the second prong, the prejudice. And the prejudice, from the government's position, Your Honor, is not whether or not he would have, in fact, gone to trial. The question is whether or not he had a plausible defense that would allow him to prevail.

And this line of questioning is only highlighting that he kept the drugs in a surreptitious manner in his home establishing knowledge that he knew he was in possession of illegal substance, that they were hidden in a way that the officers had to find them.

The next line of questioning, and I can just make an offer of proof, Your Honor, was that he has stated

that he had a defense and his defense was that he gave this to individuals, didn't sell it.

I was going to bring up the fact that Mr. Lee was involved in a proffer. I have the proffer letter where he specifically signed it that basically states that if he ever were to testify in a manner that is different than the information that [50] he provided in the proffer, it could be used to impeach him.

So I was going to impeach him. In that particular -- in that proffer he -- he states of different instances where he sold it. He -- he purchased it for six dollars and sold it for $20.

I also, Your Honor, was going to bring out the fact that --

THE COURT: Well, I certainly agree with that and he did testify that he gave it to friends and he would have witnesses that would testify to that.

He also stated on direct that he knew it was illegal to possess ecstasy. And so I'm kind of confused where we're going with the how he stored it and were these the pills. And he said there were anywhere from 85, 88 to 95 pills discovered in his residence as part of the search warrant.

But if there is no objection from Mr. Lee's counsel, I will allow you to proceed.

MR. McNALLY: Your Honor, as long as we are here, rather than interrupting again, I would object to the initial detail about where he kept them and what he would do, and what his intent was.

I think the point is being made that and [51] the photographs have been identified and they are introduced as evidence now, of what occurred during the search of the premises. And I think that is what

is relevant here, not what his intent was or why he was dealing or packaging. And it sounds like they have enough ammunition without having to go through this line of questioning with Mr. Lee.

MR. WHITMORE: If I may add, Your Honor?

THE COURT: Yes.

MR. WHITMORE: And -- and I can move on from this.

THE COURT: Yes.

MR. WHITMORE: But I think it's important when you look at the surreptitious nature of how he's concealing the drugs that where Mr. Lee is basically representing to the court that my defense was personal use.

So, when we look at the way it was packaged, the amount of drugs, so I think one of the issues that he -- he raised was that it was for personal use. The next defense he said he said he was going to assert that he would give it away.

So I can move on from that. I think the photos speak for itself, Your Honor.

THE COURT: Yes.

[52] MR. WHITMORE: But I -- I just wanted to point out the -- the way that it was concealed that he understood that this was something more than just personal use based on how he concealed this even in his home.

THE COURT: All right. Well, I will allow you to continue. I don't think he's testified that he understood that he said it is for more than personal use. So I will allow you to continue to a limited extent.

So you may proceed.

MR. WHITMORE: Okay.

BY MR. WHITMORE:

Q. Those photos represent the way you maintained the drugs in your home --

A. No --

Q. -- is that --

A. -- no.

Q. Okay. How did you maintain the drugs in your home?

A. It was just in one bag on a corner right by the book shelf.

Q. Was there anything concealing it from was -- were there books behind the book shelves?

A. It was side of kind of between the book shelf [53] and a wall --

Q. Okay.

A. -- and but it wasn't separated like this, not what is shown in the pictures.

Q. I'm not talking about the specific drugs, but I'm talking about the drugs in the bag, the 88 pills that you had in the bag?

A. Yeah, but this is like the wrapping like a certain amount individually in the pictures --

Q. Okay.

A. -- it wasn't like this.

Q. Okay. The -- the last picture where they are separated?

A. Yes, uh-huh, it's all separated, it wasn't like that, it was just one --

Q. Okay.

A. -- one bag.

MR. WHITMORE: May I approach, Your Honor?

THE COURT: Yes, you may.

BY MR. WHITMORE:

Q. I would like to show you the next exhibit in order for identification and you can tell me whether or not you recognize it.

A. Yes, I recognize this letter.

Q. And if you turn to the -- if you would turn [54] to the second page. And for the record, it's a two-page document.

Is that a two-page letter?

A. Yes.

Q. Okay. Is that your signature on the second page?

A. Yes.

MR. WHITMORE: Your Honor, at this time I would like to offer that as the next exhibit in order.

THE COURT: Any objection?

MR. McNALLY: No, Your Honor.

THE COURT: All right. This will -- the letter, two-page letter will be marked Exhibit 3 and admitted into evidence.

(Exhibit Number 3 was marked; Description: Letter.)

THE COURT: And I'm going to take just a minute.

MR. WHITMORE: Yes, Your Honor, I apologize.

THE COURT: Thank you.

All right. You may proceed.

Thank you.

MR. WHITMORE: May I approach, Your Honor?

[55] THE COURT: You may.

BY MR. WHITMORE:

Q. Do you recall being -- do you recall participating in a proffer with law enforcement agents from DEA.

A. Well, you know he said proffer, I didn't know that was, he just told me come with me, we are going to talk to law enforcement, and don't worry about it, just tell them what you know and it will not get you anything, they cannot use against anything, whatever happen in that room.

Q. Okay. And it does say that this, your statement in this -- in this proffer session or let's just call it an interview, will not be used against you, is that correct?

A. Yes. He said they can't use against you and I cannot use against them, that's what Mr. Larry Fitzgerald told me.

Q. Uh-huh.

But did you take the opportunity to read the document that you signed?

A. Nope.

Q. Okay. Did you recall that in that proffer that you were asked questions -- let me ask you, is it accurate that in -- that in 1998 that you came to [56] the United States from Korea?

A. 1998?

Q. I'm sorry, 1981?

A. I don't remember it was -- I came in 1982.

Q. Okay. And do you recall telling them that you started off as a waiter at the Chinatown Restaurant at Hickory Hill and Winchester?

A. Yes.

Q. Is that accurate?

A. Yes.

Q. Okay. And do you recall telling them in that meeting that you worked there for approximately three years?

A. Yes.

Q. And is that accurate?

A. Yes.

Q. Do you recall telling them that you opened up Mandrin Palace Restaurant in Bartlett in 1991?

A. Yes.

Q. And is that accurate?

A. Yes.

Q. Okay. Do you recall telling them that you -- you obtained $60,000 from your father Kahn --

A. Kahn Lee?

Q. -- Kahn Lee to open the restaurant?

[57] A. Yes.

Q. And is that accurate?

A. Yes.

Q. Is it also accurate that your father cosigned for you to open up the restaurant?

A. Yes.

Q. And you recall telling them that?

A. Yes.

Q. Do you recall saying that?

Do you further recall advising them that in 1994 you became the full owner of the Mandrin Palace Restaurant in 1994?

A. Okay. Hold on.

THE WITNESS: I'm sorry, Judge, may I talk to my attorney if I can.

MR. WHITMORE: I would object, Your Honor.

THE COURT: I don't -- I don't think that I can allow you to while you are a witness on the stand. Your attorney can make objections to the questions that he thinks are appropriate. If you've got -- what -- do you want to talk to him about your testimony here, about the statements in the proffer?

THE WITNESS: Yeah, the statement of proffer, because according to Mr. Fitzgerald it cannot be used for anything on that that they -- [58] that we talked about at that room.

THE COURT: Okay. And I'm unclear as to this, to, I mean, these -- the proffer wasn't under oath and now it's like we're going through putting on the proffer under oath now.

MR. WHITMORE: Your Honor --

THE COURT: And I'm a little --

MR. WHITMORE: Can I -- can I clarify?

THE COURT: Yes.

MR. WHITMORE: Our, the third line, the third paragraph, in the event the client becomes a witness in any judicial proceedings and offers testimony materially different from any statement made during the proffer, the United States may cross examine concerning any statement made during the proffer.

This provision is necessary to ensure that the client does not abuse this opportunity for a truthful proffer and further to ensure that perjury is not committed while testifying in such judicial proceeding.

He's in a judicial proceeding, he testified that one of his defenses was that he only provided this to friends.

Even though we will argue that's enough [59] for distribution, this proffer, however, he admits that he provided to people for -- he charged. And what I'm trying to do, Your Honor, is, if he's agreeing all of this is truthful in the proffer, then when I ask him specifically about this other information in the proffer and if he were to say now that is not truthful, and that's all I'm doing is establishing --

THE COURT: That's why I was a little confused because I don't think any of the questions that you have asked him so far about what he stated in the proffer impeached him on anything on direct so far.

MR. WHITMORE: No, Your Honor, I'm just making sure that it's truthful as he knows it and then I plan to ask him about this information that's in the proffer.

THE COURT: Mr. McNally.

MR. McNALLY: Yes, Your Honor.

I have a little bit of experience with these proffer agreements over in the middle district and in these same sort of collateral proceedings and my own experience is not to insist that that language not be written but I wasn't here when this proffer was entered into.

[60] I agree with the government that they can impeach Mr. Lee with questions about did you state in the proffer that you made a sale. And if there's another admission of that, then they can ask that question.

I do understand the set up that the Assistant U. S. Attorney is trying to establish to get to that point. I think what's critical here is, and I can't say that that is necessarily not relevant or appropriate for objection, to first ask did you tell the truth in this proffer and then ask the question. But I think we can get to it by getting to the questions that are germane.

THE COURT: I think that's what I'm looking for.

Certainly you can cross examine him about his work in the restaurants and him opening the restaurants, he did testify to that on his -- in direct, and if you want to explore that more fully you are entitled to on cross-examination.

I don't see that any of the statements made in the proffer about working as a waiter for three years and then opening the restaurant is inconsistent or impeaching anything he said on direct, and so that was my concern, okay.

[61] All right. Just that we all agree on the ground rules, I'm going to allow you to continue.

MR. WHITMORE: Thank you, Your Honor.

BY MR. WHITMORE:

Q. Do -- do you recall in the proffer session that -- that you were asked whether or not that when you purchased ecstasy that on one occasion you purchased, that you normally purchase anywhere from 20 to 30 pills at one time at six dollars per pill?

MR. McNALLY: Again, I object to that particular question. I think the question that is germane and relevant to cross-examination is did you in the proffer ever admit to making a sale, not what he purchased.

MR. WHITMORE: Your Honor, one of the issues, Your Honor, is that he was giving this away. I'm first establishing that he purchased it for six dollars, he didn't just sell it to anybody for six dollars, I wanted to get the bottom line price that he paid for it. I'm going to ask the next question do you recall saying -- do you recall selling it on different occasions for as much as 20 dollars.

THE COURT: All right. I will overrule the objection, I will give you some leeway on that.

[62] BY MR. WHITMORE:

Q. Do you recall that you -- you stated in the proffer that you would normally purchase the ecstasy, 20 to 30 ecstasy pills for six dollars per pill?

A. No, I don't recall.

Q. Okay. Do you recall during the proffer that -- stating that -- that if you had large amounts of ecstasy that you would sell them for $15 to $20 per pill?

A. No.

Q. Do you recall that -- that you sold to an individual, I think it's Mike Yeh, J-d-h --

A. I don't know.

Q. -- Y-e -- Y-e-h?

You sold to him and this is from 2000 and 2001 that you sold it to him for $20 per -- per pill.

Do you recall saying that in the proffer?

A. No.

Q. Do you know an individual by the name of Leong, L-e-o-n-g?

A. L-e-o -- no.

Q. Okay. Do you recall any discussion concerning an individual by the name of Leong in the [63] proffer?

A. No.

Q. Okay. Do you recall that initially when you start purchasing from Leong you were purchasing any where from fifty pills at a -- at a given time?

A. No.

Q. And you would agree that if you were purchasing fifty pills at any given time that that would not be necessarily consistent with just your personal consumption?

MR. McNALLY: Objection to the question, Your Honor.

THE COURT: What -- what basis?

MR. McNALLY: Calling for an opinion on his part that it was not a part of the cross-examination about the number of pills and things of that nature, we talked about the pills found at his home, but not about pills purchased by him, and whether that number of pills is consistent with personal use or -- or distribution.

MR. WHITMORE: May I speak, Your Honor?

THE COURT: Yes, you may, uh-huh.

MR. WHITMORE: I mean, based on the quantity that he's buying, he stated that one of the issues that his counsel could have put forth a [64] defense that this was for personal use.

And my question was that if you're buying -- buying fifty at any given time that you would agree that that is not consistent with buying for just personal use.

MR. McNALLY: And my objection, Your Honor, is that he's boxed him into either saying yes, it is not

consistent or no, it's not. The question should be, when -- did you ever purchase fifty pills or more at a time. And if he answers yes, was that for resale or was that for personal use.

So it's as to the form of the question.

THE COURT: All right. I'm going to sustain the objection.

Rephrase the question.

MR. WHITMORE: Thank you, Your Honor.

BY MR. WHITMORE:

Q. Did you purchase, did you advise during the proffer that on one occasion that you purchased fifty pills at one time?

A. No.

Q. You don't recall saying that?

A. No.

Q. Do you recall during the proffer saying that [65] you purchased as many as a hundred ecstasy pills at one time for six -- six dollars per pill?

A. No.

Q. Do you recall saying during the proffer that you used the money from the -- from the sale of ecstasy -- ecstasy, ecstasy -- excuse me -- to pay off pills?

A. No.

Q. Do you recall saying that you had a lot of credit card debt and the business was not going well?

A. No.

Q. And that the ecstasy allows you to supplement your business?

A. No.

Q. And you would agree that there is no dispute that you have distributed ecstasy to friends on numerous occasions?

A. I did not distribute, we use together.

Q. But the drugs would have been purchased by you and you would have provided the drugs to them; would you agree with that?

A. Yes, I would give it for free of charge.

Q. As it relates to the search warrant, do you recall reading this search warrant?

[66] A. Nope.

Q. Do you know that a confidential informant purchased approximately 20 ecstasy pills from you on December 8th?

A. Yeah.

Q. Okay. And you would -- you would agree that on that particular occasion you did distribute the drugs for money?

A. No.

Q. Do you recall that the confidential informant gave you three hundred dollars?

A. Yes, the cost of the pill.

Q. Excuse me, I'm sorry, sir.

A. The cost, whatever was the cost of the pill. Yeah, he give me the three hundred, the cost of the pills.

Q. And you gave him the pills --

A. Yes.

Q. -- as a result of the three hundred dollars?

A. Yes.

Q. And you gave him approximately 15 pills?

A. Yes.

Q. Okay. Did you recall that this transaction was taped, that there was a tape recording?

A. That was according to Mr. Fitzgerald, yes.

[67] Q. Did you ever have the opportunity to listen to the tape recording?

A. I asked for them and he never gave me any tapes.

Q. And you don't -- you didn't get a chance that -- that on two occasion, when you dealt with the confidential informant, that that transaction was taped; do you recall ever listening to the tape?

A. No.

Q. And did he advise you that if you went to trial that the confidential informant would be willing to testify against you as it relates to those transactions?

A. No.

Q. Did you believe that the confidential informant would testify against you?

A. I don't know at that time.

Q. Did Mr. Fitzgerald tell -- tell you about the benefits of pleading guilty?

A. Yes.

Q. And he mentioned to you that you would receive a -- a -- a -- a lesser period of incarceration?

A. No, he said I will be on probation or house arrest and -- yes, probation, house arrest. And if [68] worse case, you will be more than one year. And if you do have to go to prison, you get -- make it through the drug program and a halfway house, that the max you will be doing prison time will be four months.

Q. So, in other words, you realized that you were going to receive a substantial benefit by pleading guilty as it relates to your prison time?

A. What do you mean?

Q. That you were going to receive --

A. Probation.

Q. -- a shorter prison time as -- as probation possibly --

A. Yes, uh-huh, yes.

Q. And did he ever explain to you why you didn't qualify for a safety valve?

A. No, he didn't.

Q. Do you recall --

A. He let me know two days before the sentencing hearing, he say you didn't -- you do not qualify for it, and he say it doesn't really matter because it doesn't go below guideline.

Q. And that was due to, at the time that you were -- the search was executed that you had a firearm in your home, is that -- is that correct?

[69] A. Yes.

Q. And did he not explain to you that as a result of that that you did not qualify for safety valve?

A. No, he did not. He say -- he said it's illegal to have a firearm in the house, but it's illegal if that firearm was involved in your offense and he said I wasn't involved in the offense with the firearm.

Q. Did you have the opportunity to -- to read the Presentence Investigation Report?

A. Yes, I did.

Q. Okay. And so does Mr. Fitzgerald explain to you that you had a right to if you saw anything in there

that was inaccurate, that you could have objected to it -- that he could object on your behalf?

A. Yes.

Q. And you didn't see anything in the PS --

A. I did see every thing --

Q. Excuse me?

A. I id see a lot of things inaccurate I'm sure about the CI in it and some of the statement they made. He told me not to worry about it, he said that's how it works.

[70] Q. But you did have the opportunity to read it?

A. Yes.

Q. And as a matter of fact, during your sentencing you stated that you accept full responsibility for your action and in fact this was the biggest mistake you ever made?

A. Yes.

Q. And as result of that you actually did in fact receive a sentence substantially below the guidelines?

A. Well, I didn't know it was below my guidelines, he didn't tell me anything about what's my guideline was.

Q. Now do you recall if you looked at the Presentence Report, and, I mean, if to be sarcastic, let me rephrase that, I didn't mean it like that.

A. Yes, I know what you are saying, and they have the guideline back there --

Q. Yes, sir.

A. -- he say it doesn't matter what's back there. He's basically telling me it's just there. He did not tell me which section I belongs to.

Q. But you were present when the judge during your sentencing asked you about the Presentence Report?

[71] A. Yes.

Q. And you said that you didn't have any concerns about it?

A. No --

Q. Okay.

A. -- because that is what I was told by Mr. Fitzgerald is not to worry about the PSR.

Q. Now is -- is -- is your understanding, and I just want to make it clear for the record, Mr. Fitzgerald always mentioned to you that there could be a possibility, did he tell you that there could be a possibility that you could be deported?

A. No.

Q. Did he also tell you that you could -- that you were eligible for deportation?

A. No.

Q. Okay. But it -- but it there's no doubt in you're mind today that the judge, in fact, did go over that with you, correct --

A. When --

Q. -- during the change of plea?

A. Yes, he said, he told me it's standard procedure and you have to understand for your plea to be, you know, valid.

MR. McNALLY: If your Honor please, for [72] the record could we have Mr. Lee identify when he said he who he is talking about.

MR. WHITMORE: Okay.

THE COURT: All right. Mr. Lee, would you clarify your answer as to who he was.

THE WITNESS: Oh, that would be attorney Larry Fitzgerald.

THE COURT: Thank you.

BY MR. WHITMORE:

Q. And do you recall participating in the change of plea on June 17th, 2009 before Judge Donald?

A. Yes.

Q. And do you recall that you were asked a question, and you can tell me whether or not this is your answer, you were asked a question:

Are you a U. S. citizen?

And you replied: No, Your Honor.

Do you recall that?

A. Yes.

Q. You further --

MR. McNALLY: What -- what -- what page?

MR. WHITMORE: I'm -- I'm sorry, on page nine, my apologies.

BY MR. WHITMORE:

Q. You further, do you recall the judge saying [73] the following, and this would be your response:

Okay. A conviction on this charge then could result in your being deported --

A. Okay, excuse me, before you read that.

Before the hearing I was advised by Mr. Fitzgerald on the hearing plea changing of hearing they would ask you a lot of standard questions for non-U. S. citizen, so you have to go along with it, understand.

Q. Okay. But I appreciate that, but do you mind, I'm just going to ask you just the questions that were asked.

A. Okay, yes.

Q. Do you remember being asked the following question:

A conviction on this charge then could result in your being deported. It could also affect your ability to attain the status of a U. S. citizen. If you do become a United States citizen, it could affect your rights to participate in certain -- in certain federal benefits such as student loans, does all that at all affect your decision about whether you want to plead guilty or not?

And your -- and your reply was: Yes, Your Honor.

[74] Because at this point you're -- you have a concern?

A. Yes, because I heard deportation.

Q. And then your asked:

How does it affect your decision?

Do you recall being asked that question?

A. Yes.

Q. And your response -- and you responding: I don't understand?

A. Yes.

Q. So at this point you are having a discussion between you and the judge and you are in fact telling the judge, and this maybe based on your discussions with Mr. Fitzgerald, that you're basically hearing something different than you heard before?

A. Yes.

Q. And you understand that the judge, who ultimately makes the decision at this point is in charge, do you understand that?

A. Yes.

Q. And the question was:

Well, knowing those things, do you still want to plead --

A. All right -- excuse me.

[75] THE COURT: Just a minute.

Let him ask --

THE WITNESS: Oh, okay.

THE COURT: -- the question first and then --

THE WITNESS: Sorry.

THE COURT: -- you can answer the question and you explain your answer at that time.

You may proceed.

MR. WHITMORE: Thank you, Your Honor.

BY MR. WHITMORE:

Q. And were you asked the following question and this was your response:

Okay. Well, knowing those things do you still want to go forward and plead guilty?

And you answered: Yes, Your Honor.

A. Yes.

Q. And you understood she was saying knowing those things were referring to the fact that your guilty plea could affect your deportation?

A. Yes.

Q. Okay. Do you recall this particular question as well as your response:

Okay. There has been a plea agreement -- I'm on page ten.

[76] Okay. There's a been a plea agreement tendered. I'm going to ask you to listen as Mr. Roa summarizes the terms of the plea agreement. And let me remind, Mr. Lee, that at any time during this process if you have a question, please feel free to raise it. If you need to speak privately with your lawyer, let me know, and I will let you step back and speak privately with him. Okay.

And your respond was: Yes, ma'am.

A. Yes.

Q. Okay. And you understood any time that based on this information that you are now hearing from the judge that you may have concerns about that she's also given you the opportunity to take them -- to -- to take time to speak with your attorney privately --

A. Yes.

Q. -- and you understood that?

Do you recall reading anything about the deportation in your plea agreement?

A. No.

Q. Okay. As a matter of fact, do you recall the judge advising you during the hearing that any promises that were made to you should have been made -- should be in writing in the plea agreement, [77] do you recall that?

A. Yes.

Q. And do you recall the judge going through a litany of -- of questions of anybody threatened you, anybody exerted any kind of undue influence on you, that -- and your answer was no?

A. Yes.

Q. Okay. And do you recall during the plea agreement the judge actually asked the prosecutor to provide a factual basis for your guilty plea, I mean, to state the facts why they believe you're guilty?

A. Yes.

Q. And then at the end of that the judge turns to you and -- and basically said is that true. And do you recall responding yes?

A. Yes.

Q. Okay.

MR. WHITMORE: May I have a moment, Your Honor?

THE COURT: You may.

MR. WHITMORE: Thank you, Mr. Lee, thank you for your time.

THE COURT: Thank you.

MR. WHITMORE: May I approach?

[78] THE COURT: You may. And I think Mr. Lee has some of the exhibits, too.

All right. Any redirect, and I know everybody probably needs a break, but I just want to finish with this witness before we take a break.

MR. McNALLY: I'll be short, Your Honor, I think.

THE COURT: Okay.

MR. McNALLY: The most violated promise that trial lawyers make, but --

REDIRECT EXAMINATION

BY MR. McNALLY:

Q. Mr. Lee, you were asked several questions from your plea colloquy, the questions and answers during your change of plea hearing; do you remember that from the prosecutor?

A. Yes.

Q. Okay. And he read to you the question about whether you were a U. S. citizen and you said no and that you could be deported or it could affect your yous citizenship or if you become a citizen it could affect certain entitlements as a citizen. Do you remember that?

A. Yes.

Q. All right. And during that what were you [79] thinking the court was saying to you?

A. I don't know, when it comes to me, it's like Mr. Fitzgerald told me, it's just a standard warning for non-U. S. citizen.

Q. Now you were also asked by the court does that at all affect your decision about whether you want to plead guilty or not. And you answered, yes, it does, Your Honor.

And then the court says, okay, how does it affect your decision?

And what -- and your answer was I don't understand.

What did you mean by I don't understand?

A. When I heard, again the deportation word, that's when I say I don't understand, that's when I looked up Mr. Fitzgerald and he kind of whisper and said standard warning.

Q. Okay.

A. So I proceeded to go with the plea.

Q. Which gets to my next point.

And then the court says: Okay. Well, knowing those things do you still want to go forward and plead guilty?

And you say: Yes, Your Honor.

A. Yes.

[80] Q. Why do you say yes?

A. I had advice from Mr. Fitzgerald.

Q. Okay.

MR. McNALLY: Your Honor, I would ask that we now, since it has been referred to and read from several times enter a copy of the change of plea hearing, a transcript of that, please.

MR. WHITMORE: No objection, Your Honor,

THE COURT: All right. Do you have a copy available that we can use?

MR. McNALLY: I do, Your Honor.

THE COURT: All right, thank you.

MR. McNALLY: I will give it to the clerk, Your Honor.

THE COURT: Thank you.

That will be marked the next exhibit

Is that Exhibit 4.

THE CLERK: Yes, Your Honor.

THE COURT: All right. That's a transcript of the change of plea hearing

And I don't need to see it right now.

Thank you.

(Exhibit Number 4 was marked; Description: Transcript.)

[81] BY MR. McNALLY:

Q. Now, Mr. Lee, during the course of the question and answer between you and the judge when you changed your plea to guilty, did the judge ever ask you if your lawyer, Mr. Fitzgerald, went over immigration consequences with you?

A. No.

Q. Okay. So you were never asked about whether you had been given advice that you would be deported or not?

A. No.

Q. Okay. In fact, at that time you did not know that you could be automatically deported for an aggravated felony?

A. Correct.

Q. You understand what aggravated felony is today, though, don't you?

A. Yes, I do.

Q. A felony involving possession for distribution of a controlled substance?

A. Yes.

Q. Both will result in automatic deportation?

A. Yes.

Q. All right. No questions about that?

A. Yes.

[82] Q. Okay. But you are living that right now?

A. Yes.

Q. Okay. During the course of the exchange between the trial judge and yourself on your change of plea did the judge ask you have you discussed with Mr. Fitzgerald or has Mr. Fitzgerald discussed with you any defenses that you might have to the charges?

A. Yes.

Q. Okay. And what did you say?

A. Yes.

Q. All right. And in exchange for the offer that you were being made by the government, were you giving up those defenses, litigating those defenses?

A. Yes.

Q. Okay. Including suppression of the evidence in your home?

A. Correct.

MR. McNALLY: All right.

I have no other questions, Your Honor.

THE COURT: All right, thank you.

All right. Mr. Lee, you may step down. We will take a short break and then do you have other witnesses?

MR. McNALLY: No, Your Honor.

[83] THE COURT: Okay. When we come back, you may put on your witness.

MR. WHITMORE: Thank you, Your Honor.

THE COURT: Thank you.

MR. WHITMORE: Your Honor, how long would you like to go.

THE COURT: Let's say about a ten minute break.

MR. WHITMORE: Okay, thank you.

THE COURT: Thank you.

THE CLERK: The court is now in recess.

(Recess at 11:39 a.m.)

THE COURT: All right. When we recessed the petitioner had finished his proof. At this time the government may put on its proof.

You may call your first witness.

MR. WHITMORE: Thank you, Your Honor.

At this time we would like to call attorney Larry Fitzgerald.

THE COURT: Thank you.

And, Mr. Fitzgerald, if you will come forward there to the center of the courtroom and be sworn in and then you may have a seat in the witness stand.

THE CLERK: Do you solemnly swear or [84] affirm, under the penalties of perjury, the testimony that you are about to provide the court in this matter will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Thank you, please be seated.

[85] **LARRY FITZGERALD,**

was thereupon called as a witness on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WHITMORE:

Q. Good afternoon, Mr. Fitzgerald.

A. Good afternoon.

Q. And for the record, would you please state your name.

A. Larry Fitzgerald.

THE COURT: And, Mr. Fitzgerald, let me get you to scoot up as close as you can to the microphone and please make sure that Mr. Dudley, our court reporter, can see you as well.

Thank you.

And may proceed.

BY MR. WHITMORE:

Q. Okay. And what is your occupation?

A. I'm an attorney.

Q. And how long have you been an attorney?

A. 27 years I believe.

Q. And approximately what -- what type of practice do you operate?

A. Mostly criminal.

[86] Q. And has that been for twenty -- 26 years?

A. Mostly criminal, I do maybe 15 percent of something else, but that's about it.

Q. Approximately how many trials have you had?

A. Maybe a hundred -- one hundred at least.

Q. And over your, I guess, your long-term career you have handled many, many cases?

A. Yes.

Q. Do you know an individual by the name of Jae Lee?

A. Yes.

Q. And how do you know him?

A. I represented him in a -- in a federal case over here.

Q. And how did that representation get started?

A. I don't remember. He came in the office and talked to me and we just -- actually the case started

in General Sessions Court because they charged him in General Sessions Court at first I believe. And it came -- they transferred it to the federal courts, and that's how it got started.

Q. Okay. Did you have the opportunity to investigate the allegations against Mr. Lee?

A. Yes, there was lots of discovery that we had that Mr. Lee and I went over.

[87] Q. Do you recall whether or not there was a search warrant?

A. There was a search warrant, that's -- that's how they went into his house the first time, that's how they went into his house, yes.

Q. Did you have the opportunity to look at any defenses of whether or not you thought this -- whether or not you thought the search warrant was defective in any way?

A. I didn't think the search warrant was defective. I didn't think that the search warrant was defective, I didn't think there was a problem with it.

Q. So you believed there was probable cause?

A. I think, yes, I think they had probable cause to search.

Q. Okay. Did you have any discussion with Mr. Lee whether or not you should attack the search warrant?

A. I think we discussed the search warrant. That wasn't -- there's always an issue of a search warrant, you read it and see what it says. If you think it is something that you should attack, you do. If you don't, you leave it alone. You don't waste a lot of time if you think that the search [88] warrant was good, they had proper affidavits and that type of thing.

MR. WHITMORE: I'm sorry, Your Honor, I had to separate it out.

May I confer, Your Honor?

THE COURT: You may.

(Conference between counsel.)

BY MR. WHITMORE:

Q. And -- and you know as it relates to the search warrant there was a confidential -- a confidential informant that they used to purchase the search warrant -- I'm sorry -- to purchase the drugs --

A. Yes.

Q. -- from Mr. Lee?

A. I knew that.

Q. And that served as the basis for the probable cause?

A. Yes, I knew that.

Q. Did you discuss with Mr. Lee any defenses that you may have thought of or that he may have proposed to you?

A. Well, normally what I do I listen to my client to see what he has to say. And what we discussed mostly was the 88 pills that were in the [89] house. How did they get there, where did they come from. Why do you have them, did he have them for his personal use or what did he -- what were -- why were there, that was -- that was the main issue there.

Q. And did you ultimately make a decision or -- or come up with a conclusion as it relates to the 88 pills and how that would affect any theory that you may have?

A. Well, if -- I think they found eight in one place and 88 in another place. And my question to him was

if they found 88, it's hard to stay I have 88 pills for my personal use.

According to him, he said he just -- he didn't even know they were there, they had been there a long time, the 88 pills had been there a long period of time and he had forgotten they were even there. I -- I don't know how that would have served for defenses purposes, but that's what he said.

Q. And what was your understanding for a possible defense against distribution of drugs?

A. Well, it comes down to, could -- could we somehow overcome the state's position that he was selling them or distributing them and said they were [90] for personal use, I mean, it's just simple possession of some pills and not for any purposes.

Q. Okay. Did you believe based on your assessment of the evidence that you could overcome his argument or the government argument that they were for distribution versus personal use?

A. Well, I -- I -- I think you probably could have said that maybe it was for personal use, but for the basis of the search warrant, the fact that perhaps someone -- we discussed a friend of his or someone he knew that may have been the person that said that he was purchasing pills for him. And it -- it just -- I don't know how we get that passed the jury, it would be difficult, let's put it that way, not impossible but it would be difficult.

Q. So you felt it was inconsistent, personal use was inconsistent with the fact that you had a confidential informant who purchased from him or purchased ecstasy for a price, would that be consistent with his argument for personal use?

A. Yes. Him and his friends -- I mean, his -- he never sold them -- well, you don't -- he didn't call it a sale, let's put it that way. Whatever he paid for them, he would give them to his friends for the same price. So it wasn't profitable. He wasn't [91] trying to profit from it. He was just, I guess what they call, scoring some pills for his friends.

Q. Did you look at -- did you have the opportunity to research the law and determine whether or not that's a defense to distribution just because you do -- you do not sell them to someone versus your -- your giving the illegal drugs to someone?

A. Well, I don't think it probably would make any difference. It would just be a matter of whether we convinced the jury. A lot of things that the law says one thing, but if we can convince the jury of something else, then you do.

Q. But what was your professional decision as to the probability of being successful --

A. I thought it was a bad case to try.

Q. Okay. Now did you have any discussion with him concerning his status as -- his status in the United States?

A. I knew he was not a citizen of the United States. We -- we talked about that. And I think that was one of Mr. Lee's main concerns, it wasn't so much the act itself of what happened, it was his main concern was the fact that would they deport him or was that a possibility of deportation.

[92] Q. And what was your response?

A. There was a possibility of deportation. What I said was, and I think I sent him a letter to that effect, I think they have a letter to that effect, what I

said was that there's a possibility that you may be deported. I said I have done several cases where there were people who were convicted, they were not deported, but I can't say they are not going to deport you, I don't know.

I said in that case the state was also -- the government was also seeking deportation, as part of our agreement the government was seeking deportation, I said in this case they're not seeking deportation, but I don't know what immigration will do.

But that was -- that was a big big concern of his I'd say.

Q. Did you ever tell him that -- that deportation was not an issue, that he would not be deported?

A. No, I never told him that it would not -- I didn't tell him that he would not be deported. What I told -- I said deportation on our case, they are not seeking deportation, but I don't know what immigration will do, and I didn't.

[93] Q. And you all did have discussions about that?

A. That was his main concern. The case was pretty cut and dried. The main issue was will he be deported if he's convicted of this case in any manner, felony, misdemeanor, whatever comes out.

Q. Okay. Do you recall participating in a proffer session with your client?

A. Yes.

Q. Okay. And do you recall during that time that he was asked specific questions about whether or not he distributed drugs for money to individuals?

A. You know what, I don't, I really don't remember, I mean, I don't remember, it's been two years ago,

and I just -- I don't remember exactly what was said in that proffer session, okay.

MR. WHITMORE: Your Honor, may I approach?

THE COURT: Yes, you may.

MR. WHITMORE: Okay.

BY MR. WHITMORE:

Q. Now if there was a report made of that particular session, do you know whether or not, if you have the opportunity to look at that report, whether or not that would refresh your recollection?

A. It probably -- it would. I haven't seen it, [94] but it would, yes. If I saw it, it would refresh my recollection.

MR. WHITMORE: May I approach, Your Honor.

THE COURT: You may.

Have you shown that to opposing counsel?

MR. McNALLY: Your Honor, to speed this up, if I could just get a copy when we are concluded here, that would be fine. If I have any objections, I can raise them later. But I'm looking at the first page of the report, what purports to be a report.

THE COURT: All right. And this is a report prepared by the government?

MR. WHITMORE: Yes, it is, Your Honor.

THE COURT: And you have not seen this before, is that correct?

MR. McNALLY: I haven't, Your Honor.

THE COURT: All right. Then you have no objection to him passing it to the witness?

MR. McNALLY: I do not, Your Honor, as long as the witness can say they've seen it first.

THE COURT: All right.

MR. WHITMORE: And -- and then, Your Honor in fact, I'm just offering just to refresh his recollection, I'm not offering it into evidence. [95] And I'm just asking not to read any, would it refresh -- would that refresh his recollection, then I'm going to ask him to recall the events independently of the document.

MR. McNALLY: I have no objection.

THE COURT: All right. You may pass that to the witness.

MR. McNALLY: I just would like to get a copy when the hearing is over.

THE COURT: All right.

MR. WHITMORE: And, Your Honor, may I have this marked for identification only.

THE COURT: Yes, and that will -- and Ms. Guy, what is that exhibit number?

THE CLERK: Five.

THE COURT: That will be marked Exhibit 5 for identification only.

(Exhibit Number 5 was marked; Description: Report.)

MR. WHITMORE: May I approach, Your Honor?

BY PLAINTIFF 1:

BY MR. WHITMORE:

Q. And, Mr. Fitzgerald, I'm not asking you to read it out loud, I'm just asking you to read it and if you can tell me whether or not it refreshes your [96] recollection as to what I have just asked you, if he mentioned during that proffer session about distributing drugs for money?

A. Okay. I remember it.

MR. WHITMORE: May I approach, Your Honor?

THE COURT: You may.

BY MR. WHITMORE:

Q. So, Mr. Fitzgerald, do you recall whether or not during that proffer session Mr. Lee admitted to selling drugs for money?

A. Yes, he did.

Q. Okay. And do you recall -- let me -- let me retract that statement. Have you participated in proffer sessions before?

A. Yes.

Q. With the U. S. Attorney's office?

A. Yes.

Q. And you're aware of the proffer agreements that you as well as your client must sign?

A. Yes.

Q. And do you recall that it has the language in there that -- that this particular session can be used, the -- the statements, if you were to testify differently in a judicial proceedings, differently [97] than what you stated in this meeting today, do you recall that?

A. Yes.

Q. Okay. I -- I guess my final question is that is there any doubt in your mind that you mentioned to Mr. Lee that there was always a risk of deportation?

A. Yes, always a risk. But -- but, as I said, I guess I qualified it somewhat by saying that the government was not actually seeking to deport -- I mean, in our proffer and our agreement the government was not seeking to deport him, but I don't know what

immigration would do and that was the extent, that was it.

MR. WHITMORE: And, Your Honor, I lied, I misspoke, I said that was the last question.

THE COURT: All right. You may continue.

MR. WHITMORE: May I withdraw with that?

THE COURT: You may withdraw that statement, I won't hold you to that.

MR. WHITMORE: Okay.

BY MR. WHITMORE:

Q. Do you recall sending Mr. Lee a letter somewhat contradicting what you are saying in court today?

[98] A. Yes, I recall sending that letter.

Q. And can you explain what is -- what is your understanding of what you were trying -- what was the purpose of that letter to you?

A. I think they had sent me something to -- I think immigration was trying to deport him, and they sent me -- telling me he needed my help. And what I said was, and my understanding of that letter was, I read it yesterday, was that it was saying that as far as my agreement with the government they were not going to take a position on deportation. Sometimes they do, sometimes they want you deported, as soon as we plead, they want you out.

And normally they would tell me that that your client is going to be deported and we want him to agree to be deported. Well, that was a neutral issue. And basically that is what I was saying, that that's really -- that's a neutral issue as far as the government is concerned. But I don't know what would happen -- I don't know what would happen to immigration, I'm not sure.

Q. But the letter specifically states that during plea negotiations and -- and sentencing that there was no discussion of the possibility of deportation?

[99] A. When I read the plea negotiations, when I read the sentencing there was no discussion about deportation -- as far as during the plea discussion, no. But when I read the sentencing by Judge Donald, it was in there.

Q. Okay. I mean, the change of plea?

A. Yeah, when we did the change of plea, it was in there.

Q. Do you recall during the change of plea when -- when Judge Donald was questioning Mr. Lee about the deportation issue and the possibility of deportation, do you recall whispering in his ear to disregard that?

A. No, I didn't say disregard that, I don't think I said disregard that. He had -- he had an issue about that, whether he would be deported or not. And I think I might have told him, I might have said the same thing I've been telling him the whole time, we don't know what's really going to happen, we don't know what's going to really happen, but the government -- this government -- this U. S. Attorney is not seeking to deport him, but I can't tell him what's going to happen later.

Q. And based on your knowledge you didn't have any understanding or knowledge that deportation in [100] this case under the facts would be automatic?

A. I didn't know that the deportation would be automatic on this case, I didn't.

Q. Okay.

MR. WHITMORE: No further questions.

THE COURT: Thank you.

MR. WHITMORE: Thank you, Your Honor.

THE COURT: Mr. McNally, you may cross examine the witness.

MR. WHITMORE: Thank you, Your Honor.

Could I see exhibits one, three and four, please?

THE COURT: Yes, and you may approach.

MR. McNALLY: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. McNALLY:

Q. Mr. Fitzgerald, the words that you just used was I can't tell him what is going to happen. And that kind of basically describes a lot of what was going on in the -- in the advice or lack of advice to Mr. Lee about deportation regarding ICE or INS, correct?

A. True.

Q. Okay. And, in fact, you answered the question that you were unfamiliar or you had no [101] awareness or knowledge that a guilty plea to 21 U.S.C. Section 841, parenthetical a, parenthetical one, which was the in this indictment, possession with the intent to distribute ecstasy would result in automatic deportation?

A. No, I didn't know with any degree of certainty.

Q. Okay. And certainly did not advise Mr. Lee that he would be deported if he entered a plea of guilty to that charge?

A. No.

Q. And, in fact, the advice that you gave him was that the United States Attorney's office in his case was not seeking deportation?

A. True.

Q. Okay. There's been reference several times to a letter that you wrote to Mr. Lee.

I'm going to hand you what's been identified and introduced as Exhibit 1.

MR. McNALLY: With the court's permission may I approach the witness?

THE COURT: You may, thank you.

MR. McNALLY: Thank you, Your Honor.

May I have that same permission with some of the other exhibits?

[102] THE COURT: You may -- you do.

MR. McNALLY: Thank you.

BY MR. McNALLY:

Q. Mr. Fitzgerald, do you -- can you identify exhibit -- what has been marked and introduced as Exhibit 1 to these proceedings?

A. Yes, the letter that I wrote on May 10th, 2010, sometime after the plea --

Q. Okay.

A. -- change of plea, yes.

Q. And that's the one that you were referring to before that you had written at the request of Mr. Lee, I believe, right?

A. Yes.

Q. All right. And that second sentence there, that is correct that the government was not seeking deportation in his case?

A. That's true.

Q. Okay. And that was always your understanding in this case?

A. Well, yes -- yes.

Q. Now you mentioned several times here that deportation was a big deal: I was trying to use your words here, that that was the main issue to Mr. Lee was, am I going to be deported, correct?

[103] A. True.

Q. Okay. And you did the best you could do in trying to give him the advice that you could give him --

A. Yes.

Q. -- at the time in 2009?

A. Yes.

Q. And, in fact, you said that your practice is primarily criminal defense?

A. That's true.

Q. You said that maybe 15 percent of it is some other law, correct?

A. That's true.

Q. You do not practice immigration law, right?

A. No.

Q. You don't have immigration clients where you are processing visas or permanent residency cards or anything like that?

A. No.

Q. And you are not litigating in the INS court here in Memphis to help people avoid deportation?

A. No.

Q. Okay. And you are not a member of any of the Federal Bar Association Immigration sections or anything like that, correct?

[104] A. No.

Q. Okay. Let's talk now about search warrants.

You've had approximately a hundred trials, and I understand, just like myself, if you had to ask me how many, it would be a ballpark estimate. I am sure that you have filed and litigated suppression motions, correct?

A. That's correct.

Q. Okay. And as you said, often you will read the affidavit in support of the search warrant and if it looks like it has the probable cause or what you are accustom to seeing, you don't waste a lot of time going too much further unless you, as I like to say, unless the dog smells a trail to hunt down, right?

A. That's true.

Q. Okay. But there have been times even when you read the affidavit and said I don't think we have a very good chance of prevailing on this motion to suppress evidence, but you filed one before, haven't you?

A. Sometimes.

Q. Okay. And there's been times that you actually went forward with the evidentiary hearing, right?

[105] A. True.

Q. And there's been occasions when -- I'm going to ask you, has there been some occasions where evidence occurred during that suppression hearing that actually helped support your position to suppress the evidence?

A. It's helped sometimes both ways.

Q. Correct.

And sometimes it gets worse?

A. Yes.

Q. But we don't know when we're making the decision whether to file the motion or not what may come out of the witness' mouth when they testify, correct?

A. That's correct.

Q. And there's been times when a witness may say things that are inconsistent with the -- that's sworn to in the affidavit, correct?

A. That's correct.

Q. And that improves your chances of prevailing on the search warrant?

A. That's true.

Q. And, in fact, if you had experiences much link my own, sometimes you develop things during the suppression hearing that actually make the decision [106] to go to trial a little bit better?

A. It may benefit you.

Q. Correct. You may --

A. But it may hurt you now, it could go either way.

Q. Correct, and absolutely, I've got the same experiences, it can sometimes help you or at the worse you are going to hear what's probably already written in the affidavit, correct?

A. Yes.

Q. All right. Which doesn't hurt you much worse than what you already knew in the affidavit to begin with in terms of making the decision to go to trial or not?

A. Yes.

Q. Okay. But as we both have just said, there are times when we file motions to suppress evidence that

things do -- that the case for the defense does improve?

A. True.

Q. And that isn't known ahead of time until you have the hearing?

A. True.

Q. Okay.

MR. McNALLY: Could I see Exhibit 5 again, [107] please.

BY MR. McNALLY:

Q. You were asked some questions about the proffer letter and the proffer made by Mr. Lee to the government, correct?

A. Yes.

Q. All right. And the questions were in a sense about, well, Mr. Lee made some admissions of selling some ecstasy and you answered that you remembered that?

A. Yes.

Q. Okay. Now have you had an opportunity to review the proffer letter that was -- that was signed in this case here on February 9th, 2010?

A. The one he just gave me, yes.

Q. Correct, okay.

A. Yes.

Q. And isn't it correct that in the proffer letter the statements made by the accused cannot be used by the government in their case-in-chief?

A. That's true.

Q. Bar none, it cannot be used in the case-in-chief?

A. It cannot be used unless he makes a statement that is contrary to that, yes.

[108] Q. Correct.

So if Mr. Lee and you had decided to go to trial because of deportation or because the case started looking a little better or because he just simply wasn't going to plead guilty, and he didn't testify, then statements made during the proffer could not be used against him?

A. They could not be used against him, that's correct.

Q. Correct.

So you could get up and try the case and hold the government to their burden of proof and then sit down and his statements during the proffer would never be used against him?

A. That's true.

Q. Okay. The decision to cooperate and give a proffer often is in conjunction with the decision to enter a plea of guilty, correct --

A. Yes.

Q. -- in federal court?

A. Yes.

Q. Okay. And, in fact, in order to get the safety valve benefit to get out from below a mandatory minimum or to get a reduced sentence, it requires being truthful to the government?

[109] A. Yes.

Q. Okay. And -- and often in an effort to get the safety valve for the defendant, the decision would be made to go and give a proffer, correct?

A. Yes.

Q. Okay. And in this case there was a decision made to do a guilty plea for Mr. Lee for a change of plea for Mr. Lee?

A. You mean prior to the proffer, I mean --

Q. No, just in this case there was a decision made to enter a plea of guilty?

A. At some point, yes.

Q. Okay. And that was weighing the risk of going to trial versus the benefits of pleading guilty?

A. True.

Q. In Mr. Lee's discussions with you, he understood that by pleading guilty he -- this government, the United States Attorneys office was not going to seek deportation?

A. Yes.

Q. And he thought he was going to get a lighter sentence, which I think he did based on what we've seen so far, is that correct?

A. He did.

[110] Q. Okay. So his belief was that he would serve his sentence, whether house arrest, split confinement or incarceration, and then he would be back working at his restaurants and living here in Memphis, Tennessee?

A. I think that is what he believed, yes.

Q. Okay. All right. And that was -- I mean, as you said, the big deal for him was not to be deported, correct?

A. That's true.

Q. Okay. Because most of all of his life has been in this country, right?

A. Yes.

Q. Okay.

MR. McNALLY: Your Honor, if I may approach the witness?

THE COURT: You may.

BY MR. McNALLY:

Q. I'm handing you what's been marked as Exhibit 4 and introduced as evidence in this case and it's entitled change of plea hearing.

A. Correct.

Q. And I've opened it up to page nine I believe or page ten.

There were some questions asked of you about [111] the colloquy between, the questions and answers between the judge and Mr. Lee.

And you said that at one point the judge asked, are you a U. S. citizen.

Do you remember that?

A. I do.

Q. Okay. And if you need to I've turned to the pages where I think this particular question has been answered are located at the bottom of page nine.

The judge asked him, are you a U. S. citizen. He said no, I'm not Your Honor.

And then the judge says, this charge could result in you being deported and it could also affect your ability to attain the status of a United States citizen.

That goes between nine and ten which at the very --

A. Yes.

Q. Okay. And in reading that and in hearing that it would -- would you not agree that the judge is basically saying you might be deported, you could be

deported or you might be able to stay here, and it might affect you being a citizen, correct?

A. Yes.

[112] Q. Okay. And, in fact, it goes on to say, does this affect your decision about whether you want to plead guilty or not. And Mr. Lee says, yes, Your Honor.

Correct?

A. Yes.

Q. And do you remember that happening in court?

A. I do.

Q. Okay. And if you are like me, you probably went, okay, let's see where we are going here now because he's saying that it does affect my decision, Your Honor; correct?

A. Yes, I remember that.

Q. All right. And then the judge says, how does it affect your decision? And Mr. Lee says, I don't understand.

Correct?

A. Yes.

Q. All right. At that point when he said I don't understand, did he start to talk to you or want to confer with you or anything in that --

A. He did, I think we took a second or two to confer.

Q. Okay. And then the judge comes back and says, well, knowing all of these things, do you [113] still want to go forward and plead guilty? And he says yes.

MR. WHITMORE: Your Honor, I'm going to object, that is a misrepresentation of the transcript. I mean, to the extent that not concerning what the

witness said, but Mr. McNally's characterization that then the judge took a break, and that's not in the transcript, so that characterization is a -- is a -- is a misstatement of fact.

THE COURT: Well, rephrase your question --

MR. McNALLY: Okay.

THE COURT: -- it may have been interpreted as this is what the transcript says.

BY MR. McNALLY:

Q. Mr. Fitzgerald, after Mr. Lee said I don't understand, what happened next during the change of plea hearing?

A. I think we talked for a few seconds.

Q. Okay. And by we, you mean you and Mr. Lee?

A. Mr. Lee and myself.

Q. Okay. Thank you on that part.

Mr. Fitzgerald, had you known that there was no question Mr. Lee was going to be deported at the [114] time the decision was being made to plead guilty or not, would you have proceeded to trial with Mr. Lee?

A. Yes.

Q. Why?

A. Well, in deciding whether I go to trial, I kind of determine what my client has to lose. If the state offered me anything where my client has nothing to lose, then I may as well try it, because if I try it, I may win. So -- I mean, sometimes I base on whether we go to trial based on what the client as well and I base on what does -- what does he have to lose. If he has nothing to lose, then I go to trial. Because I can't do any worse than what they have already done.

Q. And as you said, your decision to go to trial ultimately is based on what the client wants to do, right?

A. Yes.

Q. And in this case, if Mr. Lee had known that he would be deported for a plea of guilty to this indicted charge, do you believe he would have gone to trial?

A. Probably, yes.

Q. Okay.

MR. McNALLY: Thank you, sir.

[115] No other questions, appreciate it.

THE COURT: Thank you.

Any redirect, Mr. Whitmore?

MR. WHITMORE: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. WHITMORE:

Q. As it relates to the change of plea hearing, I mean, the -- the transcript, there is no pause between -- the transcript does not reflect a pause at all between Judge Donald's discussion with Mr. Lee to your knowledge?

A. No.

Q. Based on your experience and training, in light of the evidence that was against Mr. Lee, what is your -- what is the probability of -- of success, I mean, as a defense counsel you have to make an assessment whether or not your client would be successful or not, and that's part of your recommendation to the client, but what would been your assessment of him possibly prevailing in light of the evidence against him?

A. It probably was a losing proposition in someway. Of course, you know, as defense counsel, you have a lot of losing propositions that you end up coming out better than you think.

[116] Probably the best -- the best thing that could have come out of this was maybe a possession, that's it. I mean, I just -- I don't think there would be no way around the fact that he possessed the drugs, I mean, he possessed them, I don't know --

Q. And -- and we're talking about, also, the issue of -- I think Mr. McNally brought up the issue of the defendant not testifying.

What's key to your strategy is for Mr. Lee to be able to testify and said this is really for personal use, and the alternative to be able to say as well I'm not really distributing it, I'm giving it to people --

A. Well, that --

Q. -- so what if you can't get that information in now because you are not going to put him on the stand, so there is no chance of you getting any of that potentially mitigating evidence in, how would -- what -- how would that impact the probability?

A. Well, I think the probability would go down for us winning. If we couldn't get him to say anything, and there would be a problem if he got on the stand because that proffer letter would -- says [117] something totally different from what he's saying --

Q. Okay.

A. -- so it would just have to be strategy decision we would have to make and decide what we were going to do. The risk we would have to take I guess.

Q. And we also know that there were substantial benefits that he gained by pleading guilty, hypothetically speaking?

A. Yes.

Q. And, as a matter of fact, hypothetically speaking, if he would not -- not hypothetically speaking, he would have not received acceptance, right; the three points --

A. Three points, yes.

Q. -- acceptance if he decided to go to trial?

A. Yes.

Q. There's a likelihood he possibly would not have received the low end of the guideline as a result of going to trial?

A. Yes.

Q. Not only that, he probably would not have had the opportunity to provide a contrite, a humble statement to the court, like he did, confessing what he had done as being a mistake if he had gone to [118] trial, which, in fact, maybe would have impacted his sentence?

A. Yes. He would probably would have gotten -- let's put it that -- he probably would have gotten a greater sentence if that had been the case, probably.

Q. So what he was -- he was facing 24 to 36 months based on acceptance and the possibility of the low end of the guidelines; is that your understanding?

A. That -- that's true.

Q. And so, therefore, if we're not talking about acceptance, or the low -- nor the low end of the guidelines, we're talking now anywhere from three to five years; isn't that correct?

A. That's correct.

Q. And have you had clients in the end, regardless of what they initially said they would do, but once they thought about the time that they were would really have to spend in prison in the end made a decision to tell you to go ahead and resolve it to limit their -- their exposure?

A. Yes.

MR. McNALLY: Objection to what other clients may have done or not done and then move to [119] strike the answer.

THE COURT: Objection -- yes, I will let you be heard.

MR. WHITMORE: Your Honor, to the extent that, and this is not an issue that I'm saying that Mr. McNally did the same and I didn't object, but this is within the realm of strategy and the possibilities because I think -- I'm following his line of questioning that he asked him about the possibility as it relates to his clients, as it relates to the search warrant, the possibility, all of these issues he's opened the door to this type of dialogue. And I'm just trying to bring it in perspective and say there is also another side to what you said on cross-examination.

THE COURT: And that's certainly acceptable, I am still going to sustain his objection as to what other clients --

MR. WHITMORE: Okay.

THE COURT: -- have done --

MR. WHITMORE: Okay.

THE COURT: -- and so that answer --

MR. WHITMORE: Okay.

THE COURT: -- will be stricken.

[120] BY MR. WHITMORE:

Q. Well, is there a possibility, based on your dealing, that Mr. Lee could have changed his position and asked you to resolve the matter in the end?

A. I don't understand the question, I'm sorry. What -- what -- I'm sorry.

Q. No, no, it's the way -- I'm sure it's the way I'm forming it because I'm trying to regroup now.

Let me -- let me also ask you -- let me switch gears here.

Did you perform a thorough analysis of the search warrant to assess whether or not there's a probability of success?

A. Yes. You look at the search warrant, you look at the affidavit, you look at everything that goes with it. If you have a problem, then you file a motion to suppress, that's what you do.

If you don't have a problem, you don't. If the affidavit is sufficient and the search warrant looks, you don't. But sometimes you will file one, more so in state court than federal court, you will file one for various reasons.

I mean a motion to suppress, I'm sorry, I said file one.

[121] Q. And -- and with a search warrant you also have the, not only the -- the -- the officer providing -- the affiant providing the facts for the search warrant, but you do have the magistrate or the judge really serving as the gatekeeper as well whether or not the search warrant is valid?

A. He has to sign it, yes. He or she.

Q. And have you ever dealt with a search warrant before signed by Judge Pham?

A. No, I don't think so.

Q. Do you have any reason to think that he would have lightly assessed the -- the probable cause as it relates in his search warrant?

A. Well, who signs it doesn't matter -- doesn't matter me, I mean --

Q. Okay.

A. -- when it comes down, I don't care who signs it. If I think it's improper, then I do what it takes. I mean, I think the judge can on what the facts that he is given as far as the search warrant is concerned. But if I look at it, regardless of whether the judge signed it or not, if it doesn't look proper, then I do something, you know, I take some type of action.

[122] Q. But you were saying as a defense counsel just because you are going to trial, you don't have to file a motion to suppress when you -- when you believe that the warrant as sufficient, you can --

A. No.

Q. -- not attack the search warrant but still go to trial?

A. Yes.

Q. Okay. And, as a matter of fact, our proffer sessions in the U. S. Attorney's office, you can have a proffer session with the U. S. Attorney and still go to trial as well?

A. You can.

Q. Has the fact that the U. S. Supreme Court case, I think the case is *Padilla* has -- has established a bright line as it relates to these types of issues, will

you now handle your practice differently in light of this current Supreme Court case?

A. I would make them sign something saying that they, I mean, you just give them a letter --

Q. Right.

A. -- and have them sign it, a statement, have them sign it.

Q. Prior to this particular case, did you have [123] any reason to do anything like that?

A. Not to have them sign anything, no.

Q. Did you have any reason, prior to that Supreme Court case, to be concerned about this particular issue as it has been raised now?

A. Deportation, yes. I just -- I have done a case like maybe a year before that, and they didn't deport my client, I mean, it was a felon, they didn't deport him for whatever reason.

Q. And are you making a dichotomy or a distinction between the U. S. Attorneys' office and what the agency immigration can do?

A. That's totally two totally different agencies.

Q. So you see that the U. S. Attorney's office dealing with this in a judicial setting is where your responsibility lies and to the extent what immigration may do to his case, your -- your advise was I can not say what immigration may ultimately do; was that your advice?

A. That's true.

Q. Okay.

MR. WHITMORE: I have no further questions, Your Honor.

THE COURT: All right. I will allow [124] limited recross if you want any. I usually don't, but there were a number of other areas gone into.

RECROSS EXAMINATION

BY MR. McNALLY:

Q. Mr. Fitzgerald, let's get to the bottom line of your representation with Mr. Lee and the decision --

A. Yes.

Q. -- to plead guilty or not.

If me had been offered three years and reliable assurances that he would not be deported, would he have taken that?

A. He would have.

Q. Okay. The key to his decision to plead guilty or not guilty was about not being deported?

A. That's correct.

Q. Okay. If he thought there was -- if he knew that he would be deported upon a plea of guilty to the indicted charge, would he have taken the chance of going to trial?

A. I would have advised him to.

Q. Put on the possibility he might be found guilty of simple possession or not guilty if the government didn't meet its burden?

A. Yes.

[125] Q. Okay.

MR. McNALLY: Thank you, sir, that is all I need to ask.

THE COURT: All right. Thank you, Mr. Fitzgerald, you may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you for being here today.

MR. WHITMORE: No further evidence, Your Honor.

THE COURT: And if you'll pass that transcript there.

Thank you.

(Witness excused.)

THE COURT: Do you have any other witnesses?

MR. WHITMORE: No further evidence, thank you, Your Honor.

THE COURT: Any rebuttal proof?

MR. McNALLY: No, Your Honor.

THE COURT: All right. Counselors, how do you want to proceed in closing arguments?

Do you want to make them here today?

Do you want to -- is Mr. Fitzgerald needed any further?

[126] MR. WHITMORE: No, Your Honor.

THE COURT: Uh-huh. You are excused, thank.

THE WITNESS: Did I leave my glasses?

THE COURT: Did you leave your glasses up here?

All right. If we find a pair, we will make a note that they are yours.

If you -- do want to make closing arguments today, we can take a lunch break, come back, we can go ahead and do them right now or I'm going to Mr. McNally the opportunity to submit written briefs if he wants to. I know that you have not submitted a written brief in the case. Mr. Lee has filed, I guess,

his motion and his reply pro se, although I must say he did an excellent job in them.

What's your position?

MR. McNALLY: If it pleases the court and I think my learned counsel would disagree with me probably because I'm making more work, but given the -- in light of the cases that are coming out in 2011, I would like to submit a written brief particularly on two of the issues.

One is, what does *Padilla* really require of counsel? Is it enough to say that you could be [127] or does it really require that you give succinct and straightforward advice, particularly if the consequences are automatic deportation.

I'm sure the court can gather from what I'm looking at that I think I know the position that the Sixth Circuit has taken.

And then the second I think would be on the retroactivity, I think it would help the court if I could actually identify the cases in a written brief as to where they are, and candidly they are all over the place.

THE COURT: Right.

I think it would be helpful to the court, I know the briefs don't address some of the more recent decisions in this area. And rather than us do the research, it would be helpful if you do the research and provide it to us.

Mr. Whitmore.

MR. WHITMORE: Well, Your Honor, on the issue of whether the attorney should say, I think *Padilla* is clear and I was going to point to the case where it uses the term eligible, possible, risk, there's

nothing in the case. And the defendant was in the same situation the court said all you need to do is -- is state that the person [128] may be eligible because we are not going to really put all of this responsibility on the defense counsel.

So from that standpoint point I think the government's brief kind of speaks to itself as it relates to addressing those issues.

But if Mr. McNally wants to reply and I would ask Your Honor, may I be given the opportunity to respond because I, too, looked at the cases late last night and there's not a lot out there, still not a lot of guidance. I was hoping that in fact, at least the Kentucky part of it, because I really believe, Your Honor, the most concerned part, even if the government were to concede the first part.

THE COURT: Right, the first part.

MR. WHITMORE: I still believe, and I'm having a hard time addressing this particular issue, is the outcome described in *Stickland* as relates to facts likes this, is it that he would have gone to trial or would the facts, the conviction have been the same. And that's the reason you see me try to get into the evidentiary issues because I'm not for sure where the court is leading, even though they mentioned a case dealing with parole elgibility.

So if the court wants to kind of bypass [129] the oral argument part or do a hybrid, we still do the oral argument and still file the brief, it doesn't matter to me. I don't know what we have to say would be helpful to the court anyway without it being in writing.

THE COURT: I mean, I'm -- I would be glad to entertain oral argument, but I do on some reflection think that the written briefs would --

MR. WHITMORE: Absolutely.

THE COURT: -- be helpful and the additional research.

I would tell you, the retroactivity issue I've not confronted before, but it is somewhat troubling to me because obviously Mr. Padilla in this Supreme Court case pled guilty prior to the time that Mr. Lee pled guilty, and the Supreme Court comes back and says and reverses the, as I read -- I just skimmed through it myself, but reverses that conviction or sends it back down.

It wouldn't make any sense to me that Mr. Lee during that same timeframe wouldn't be entitled to that same type of advice that Mr. Padilla was. Then I guess it becomes a factual question. So I'm a little puzzled on the retroactivity issue.

[130] Let's set a briefing schedule, and then we will decide about whether you want to proceed with oral argument.

First, as to a written brief, Mr. McNally how long would you need or how much time do you request.

MR. McNALLY: Could I have 21 days, Your Honor?

THE COURT: I have no problem with that.

And let's see, that would be three weeks from today, today is Thursday the 9th. So we will put it due, that would be -- let's do it Friday, March 2nd.

And, Mr. Whitmore, do you want the same amount of time to respond or how much time do you ask for?

MR. WHITMORE: That would be -- that would be fine, Your Honor, thank you. Because I have military duty along this period of time where I'm going to be out of town for about a week, so that would -- that would cover that time and allow me --

THE COURT: So that would put yours due Friday, March 23rd.

Now do you want to make any oral arguments today?

[131] You are not required to do so, you can make them in the written briefs.

If so, do you want to do them now or take a lunch break and come back.

MR. McNALLY: Your Honor, I will waive oral argument. I think we have kind of identified some of the issues that we are interested in and Your Honor has identified the one about the retroactivity in light of Padilla's situation.

The only request I have is there anything else that the court is particularly interested in the legal issues being briefed or factual issues?

THE COURT: The same thing that Mr. Whitmore brought up, which is really the second prong in the prejudice is the test of whether he would have not entered a guilty plea but gone to trial, or whether he would -- he would have prevailed at trial. How far do we have to go to determine prejudice.

MR. McNALLY: Or exactly what they mean by prejudice --

THE COURT: Right.

MR. McNALLY: -- in light of the --

THE COURT: Right.

Now I understand Mr. Whitmore's questions [132] to Mr. Fitzgerald, if Mr. Lee couldn't testify, then would that reduce his chances. But then again I look at it it's very possible as well if Mr. Lee had known it was automatic deportation, then he may not have agreed to enter a guilty plea which then he may not have agreed to a proffer and then you wouldn't have had the proffer, then he could have taken the stand. So I'm not sure how that plays out as well.

All right. Counselors, I appreciate your hard work on this case and your excellent job this morning.

As I said, the briefs thus far have been excellent. I think neither one of you have filed any of the briefs, so I will give you an opportunity to the put in your opinion on this case.

MR. WHITMORE: Thank you, Your Honor.

MR. McNALLY: Thank you, Judge.

THE COURT: That's all.

The court will stand in recess.

We could have that one document that was for identification only, I don't think we need to keep that.

MR. WHITMORE: No, Your Honor.

Thank you very much.

(Adjournment at 12:48 p.m.)

[133] **CERTIFICATE**

I, Lynn Dudley, do hereby certify that the foregoing 132 pages are, to the best of my knowledge, skill and ability, a true and accurate transcript from my stenotype notes of the evidentiary hearing on February 9, 2012, in the matter of:

JAE LEE

vs.

UNITED STATES OF AMERICA

Dated this 23rd day of May 2013.

Lynn Dudley
Official Court Reporter
United States District Court
Western District of Tennessee

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

JAE LEE, Movant, v. UNITED STATES OF AMERICA, Respondent.	Case No. 2:10-cv-02698-JTF-dkv Case No. 2:09-cr-20011-BBD

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that in accordance with the Order Adopting in Part and Rejecting in Part Magistrate's Report and Recommendation, Denying Motion to Pursuant to 28 U.S.C. § 2255, and Granting a Limited Certificate of Appealability, filed on March 20, 2014, this matter is hereby dismissed. Judgment entered in favor of Respondent.

APPROVED:

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge

March 20, 2014
Date

s/Thomas M. Gould
Clerk of Court

s/ Erica M. Evans
(By) Law Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

JAE LEE,	§	
Petitioner,	§	**Case No. 2:10-cv-02698-JTF-dkv**
v.	§	
UNITED STATES OF AMERICA,	§	**Case No. 2:09-c4-20011-BBD**
Respondent.	§	

NOTICE OF APPEAL

Notice is hereby given that the Petitioner, Jae Lee, in the above-styled case, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the judgment and conviction entered in this action on March 20, 2014.

Respectfully submitted,

WEATHERLY, MCNALLY & DIXON, PLC

By: s/Patrick T. McNally
PATRICK T. MCNALLY
(Tenn. Bar #010046)
Fifth Third Ctr.
424 Church Street, Ste 2260
Nashville, Tennessee 37219
(615) 986-3377

Attorney for Jae Lee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal has been sent via the Court's electronic filing system to Mr. Kevin P. Whitmore, U.S. Attorney, Federal Bldg., 167 N. Main Street, Suite 800, Memphis, Tennessee 38103,on this the 31st day of March, 2014.

/s/Patrick T. McNally
PATRICK T. MCNALLY